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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. A-843

W. R. (BILL) SHORE, d/b/a SHORE OIL PRODUCTS, ET AL
Petitioners,
V.
LONGVIEW REFINING COMPANY and CRYSTAL OIL COMPANY,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LONGVIEW REFINING COMPANY and CRYSTAL OIL COMPANY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals of the United States entered in this action on February 15, 1977, reversing the

judgment of the district court awarding damages to the Petitioners for illegal overcharges in violation of the Economic Stabilization Act of 1970, as amended (Stablization Act), Pub.L. 92-210, 85 Stat. 743; Pub.L. 93-28, 87 stat. 27, E.O. 11748, 38 F.R. 33575., and the Emergency Petroleum Allocation Act of 1973, as amended (Allocation Act), P.L. 93-159, E.O. 11748, 38 F.R. 33577 and regulations thereunder.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals is unreported and is reproduced in Appendix A. The judgment and the findings of fact and conclusions of law of the district court are unreported, and are reproduced in Appendices C and D, respectively.

JURISDICTION

The final judgment of the Temporary Emergency Court of Appeals was entered on February 15, 1977. The Court of Appeals denied Petitioners Petition for Rehearing on March 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

After trial before the court, the United States District Court for the Eastern District of

Texas, Tyler Division, found that the Respondent Longview Refining Company violated the price "freeze" order, i.e., Executive Order No. 11723, 38 F.R. 15763, June 15, 1973, and that the Respondents Longview and Crystal overcharged the Petitioners under pricing regulations following the freeze order. The Temporary Emergency Court of Appeals reversed and remanded for further proceedings. The questions presented are:

1. (a) Whether the Temporary Emergency Court of Appeals correctly held that the trial court applied incorrect standards in determining that the overcharges by the Respondents were willful.

   (b) Whether the Temporary Emergency Court of Appeals correctly held that to be willful an overcharge "must have been made with the specific intention of charging a price which the defendent knew was in excess of the ceiling price allowable under the applicable pricing laws and regulations".

(c) Whether the Temporary Emergency Court of Appeals correctly held that there "must be clear and convincing proof that an overcharge was willful.

2. Whether the Temporary Emergency Court of Appeals correctly held that the overcharges during the "freeze" period were not determined by correct standards and must be relitigated.

3. (a) Whether the Temporary Emergency Court of Appeals is correct in holding that the failure of a defendent to perform the calculations under the pricing formula constitutes no legal wrong.

(b) Whether the Temporary Emergency Court of Appeals correctly held that in testing the overcharge under the pricing formula defendants are entitled to consolidate certain of their operations for pricing purposes.

(c) Whether the Temporary Emergency Court of Appeals correctly held that "reseller" has two different definitions in the regulations under the allocation

act and that one definition (in subpart B, 10 C.F.R. § 212.31) is not to be considered while the other definition (in subpart F, 10 C.F.R. 212.91) is to be considered in defining "refiner" (under subpart E, 10 C.F.R. 212.81, et. seq.).

(d) Whether the Temporary Emergency Court of Appeals correctly held that the trial court did not make proper determination of "class(es)" and "base price" for purpose of application of the pricing formula.

(e) Whether the Temporary Emergency Court of Appeals correctly held that the plaintiffs' calculations of the overcharges, on which the trial court relied, failed to take into account the refiner's incentive factor and erroneously figured the overcharges by using the current month as the month of measurement.

4. Whether the Temporary Emergency Court of Appeals was correct in ordering the joinder of the Federal Energy Administration upon the remand for retrial.

STATUTES INVOLVED

The Economic Stabilization Act of 1970, as amended (Stablization Act) Pub.L. 92-210, 85 Stat. 743; Pub.L. 93-28, 87 Stat. 27; and the Emergency Petroleum Allocation Act of 1973, as amended (Allocation Act) P.L. 93-159, E.O. 11748, 38 F.R. 33577 and the regulations promulgated thereunder are directly involved in this case. The pertinent portions of the Economic Stabilization Act (which were adopted in Sec. 5 (a) of the Allocation Act) are:

> "(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in Sec. 211), and/or damages. (b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the

> plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:
>
> (1) an amount not more than three times the amount of the overcharge upon which the action is based, or
>
> (2) not less than $100 or more than $1000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge;"

The regulations pertaining to the questions presented in this case are contained in Appendix A to the opinion of the Temporary Emergency Court of Appeals, or in 10 C.F.R., Part 212 to which regulations specific reference will be made in the text of this petition.

STATEMENT OF THE CASE

Petitioners, at pertinent times, have been in the business of purchasing gasoline and diesel fuel directly from one or more refineries and reselling the gasoline to or through service station facilities for retail distribution to customers. All have been purchasers of gasoline and/or diesel fuel from the Respondent Longview Refining Company for varying periods of time.

Longview Refining Company is a domestic corporation which owns and operates a refinery in Longview. Texas. Prior to its acquisition by Respondent Crystal Oil Company of Shreveport, Louisiana, the stock of Longview Refining Company was privately held. Longview Refining Company became a wholly-owned subsidiary of Crystal Oil Company, effective November 1, 1973.

Crystal Oil Company owns all of the outstanding corporate stock of the following corporations (in addition to Longview Refining Company): Berry Petroleum Corporation, Crystal Service Corporation; Crystal Resources Incorporated; Crystal Indonesia Oil Corporation; Mercury Discount Corporation; Tulsa Oil Corporation; Crystal Petroleum Corporation;

Stone's Enterprises, Incorporated; Stone's Independent Oil Distributors, Incorporated; Stone's Independent Oil Company; Panhandle Towing Company; High Octane Terminal Company; Joe E. Hutchison Distributing Company; High Octane Terminal Company; Joe E. Hutchison Distributing Company; Adobe Refining Company; Crystal-Princeton Refining Company; Crystal Sharjah Oil Company; and Crystal-Rico Company.

The Crystal subsidiaries are located in various parts of the United States and overseas, and service different market areas. Some of the companies are engaged in refining, while others are engaged in retail distribution, crude oil production, and non-petroleum industry activities

Phase IV pricing regulations were ushered in by Presidential Proclamation or Executive Order establishing a "freeze" period, effective June 13, 1973. The "freeze" period was due to expire on August 12, 1973, but was extended to August 19, 1973. On August 19, 1973, the "freeze" period was superseded by regulations promulgated pursuant to the Economic Stabilization Act of 1970. The Phase IV price

regulations were originally codified in Part 150, but subsequently recodified in Part 212 of Chapter II of Title 10 of the Code of Federal Regulations. Mandatory Petroleum Allocation Regulations enacted pursuant to the Emergency Petroleum Allocation Act of 1973 were codified in Part 211, and administrative procedures applicable thereto were set forth in Part 205.

During the "freeze" period of the Phase IV regulations and for approximately two and one-half months after the effective date of the pricing regulations under Phase IV, Longview Refining Company was a privately-owned, wholly independent corporation. After the "freeze" period, while the stock of the Longview Refining Company was still privately held, Longview enacted price increases purporting to be in accord with the Phase IV regulations and the pricing formula contained therein. After the acquisition of the stock of the Longview Refining Company by the Crystal Oil Company on November 1, 1973, a series of price increases ensued, which drastically altered the pricing structure of gasoline and diesel, and detrimentally affected the operations of the Petitioners, certain of whom were ultimately forced out of business.

The net result of these pricing practices was to reduce purchases by the Petitioners. Prior to the acquisition of Longview by Crystal, Petitioners historically purchased approximately 30% of the output of Longview Refining Company. After the acquisition Petitioners' purchases were reduced to approximately 9.4% of the output. This reduction was in accord with the apparent design of Crystal to divert the supply of Longview Refining to its own retail distribution system.

Substantial overcharges resulting from the series of price increases instituted after Crystal's acquisition of Longview were admitted by Crystal's representatives, publicly, (letter dated March 8, 1974, filed with the Federal Energy Office, R. 538-39), and in testimony (R. 539, et. seq.). Initially, there was no effort whatsoever to follow the formula specified in the pricing regulations. Effective about March, 1974, well after suit was filed (and after the alleged period of overcharges) Respondents did purport to commence following the formula, but failed to consider the large accumulated overcharge originating January, 1974, and prior thereto, in the application of the formula. As of

April, 1974, the Respondents were ostensibly following the formula, without carrying forward the accumulated overcharge, to the operations of Longview Refining Company as a separate entity. (See Cross-examination of Mr. Burns, R. 538, et. seq., and discussion, infra.). Shortly before trial, Respondents advised that they had revised their position, and were applying the formula to Crystal and certain of its subsidiaries on a consolidated basis. Through this process, Respondents took the position that the overcharge had been eliminated. (This occurred well after the end of the period of overcharge alleged by Petitioners, i.e., February 28, 1974.)

Petitioners' suit presented for determination questions as to the validity of the "freeze" price charged by Longview Refining Company during the period June 15, 1973, through August 19, 1973, and the price increases enacted by Longview Refining Company after the effective date of the pricing regulations. After judgment in Petitioners' favor, Respondents' appeal produced the opinion by Judge Estes of the T.E.C.A., which gives rise to the questions here presented.

REASONS FOR GRANTING THE WRIT

1. The trial court correctly held that the overcharges by Respondents willful.

The Economic Stabilization Act, Pub.L. 92-210, 85 Stat. 743, Pub.L. 93-28, 87 Stat. 27 provides in Section 210(a) that any person suffering legal wrong because of any act or practice arising out of this title or any order or regulations issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for declaratory judgment, writ of injunction and/or damages. Section (b) provides that in any action brought under Subsection (a) against any person selling goods who is found to have overcharged a plaintiff, the court may, in its discretion award the plaintiff reasonable attorney's fees and costs, plus whichever the following sums is greater:

(1) An amount not more than three times the amount of the overcharge upon which the action is based, or

(2) Not less than $100.00 nor more than $1,000.00 expect that in any

case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error, the liability of the defendant shall be limited to the amount of the overcharge.

Section 210 (which was adopted by Section 5(a) of the Allocation Act) further provides that where the overcharge is not willful within the meaning of Sec. 208(a) no action for the overcharge may be brought unless the plaintiff has first presented to the seller a claim for refund and has not received payment for the overcharge within ninety days. Sec. 208(a) gives no definition of willful, buy simply states that whoever willfully violates any order or regulation shall be fined not more than $5,000.00 for each violation.

The proper definition of "willful" within the context of a civil suit for recovery of overcharges is a question of considerable importance.

The Economic Stabilization Act, the Emergency Petroleum Allocation Act, and the Mandatory Petroleum Price Regulations constitute a complex and pervasive system for the regulation of one of the nation's largest industries. The industry is so large and so complex that effective centralized enforcement of the price regulations governing it is impossible. Congress recognized this fact, and enacted Sec. 210 to deal with the problem. The Congressional purpose was to provide for private action by those firms with the most direct interest in effective enforcement and the most immediate knowledge of any violation. As stated in the Senate report on Sec. 210:

"Section 210 provides a traditional method by which violators of regulations may be discovered and other would-be violators may be deterred. This can be accomplished by authorizing a person suffering a legal wrong to bring a treble damage action against a violator. (S. Rep. 92-507, Nov. 20, 1971, to accompany S. 2891)."

The House report is even more specific:

> "The Committee, in line with the Administration's emphatic request for voluntary surveillance to assure compliance with price and rent regulations and orders, adopted this section so that it would serve not only to provide a strong deterrent to those who would willfully violate this Act. (H. Rep. 92-714, December 7, 1971, to accompany H.R. 11309)."

Thus, Congress (by enacting Section 210 and incorporating it into the Emergency Petroleum Allocation Act) attempted to enlist the numerous purchasers of petroleum products as "private attorneys general" to assist in discharging the responsibility of enforcement.

Congress obviously was aware that mistakes might occur in a firm's attempt to adhere to a complex set of regulations. To protect against precipitous suits resulting from unintentional overcharges it included a requirement of notice and ninety-day waiting period in Sec. 210. Just as obviously, it was not the intention of Congress to clog the vital process of private enforcement with a superfluous and unnecessary notice requirement

when such notice would accomplish nothing. Therefore, the willfulness exception was adopted.

The opinion of the lower court places strictures upon the proof of willfulness which thwart the will of Congress and are at variance with both civil and criminal definitions of the term. It reaches the conclusion that pricing decisions entirely made without reference to the regulations and consistently and consciously adhered to by the Petitioners can not be the basis for an allegation of "willful" overcharge, even though such decisions result in overcharges. The self-enforcing nature of the regulations envisioned by Congress is thus undermined, and the ability of purchasers of petroleum products to recover overcharges inflicted upon them is substantially weakened, if not altogether stifled.

The purpose of the ninety-day notice provision was to provide an opportunity for a seller to correct an honest mistake. In cases where it is clear that the seller will not correct the mistake, the ninety-day waiting period is an unnecessary and unreasonable burden.

Notice is a useless and dilatory exercise in cases where the supplier has indicated its determination to continue charging the price which it has been charging. The lower court is correct when it notes that the act contains no provision which would "excuse failure to present a claim for refund simply upon a conclusion that it would have been futile" (Footnote 17, page 12, Appendix A). But where the futility is born of the sellers persistence in its pricing decisions, and those decisions result in overcharge, the willfulness exception should be satisfied. An action should be considered willful if it is intentional, the result of a fixed and deliberate decision, and unlikely to change.

The trial court stated in Conclusion of Law 14 (App. D) that the civil meaning of willfulness is applicable. Having so stated, the trial court then formulated the test for willfulness applicable to the present case:

> "...Thus, in the framework of this case, an overcharge is willful where it is deliberate, or where it is the natural and probable consequence of actions of the defendants which are voluntary and intentional or which are in reckless disregard of the

> applicable regulations, as opposed to being the result of a bona fide error notwithstanding the main tenance of procedures reasonably adapted to the avoidance of such error." (C.L. 14, App. D, emphasis supplied).

When the wording and intent of Sec. 210 are considered, it is apparent that this quotation embodies the correct standards for the "willfulness" determination and it matters not whether the test is denominated "civil" or "criminal".

(a) The trial court used correct standards to determine the question of willfulness.

The lower court held, because Sec. 210(b) refers for the meaning of "willful" to Section 208(a), the term must be construed in its "criminal sense," a contention suppported by dictum in Manning v. University of Notre Dame, 484 F.2d 501 (Em.App. 1972). But the court ignored the standards actually used by the trial court, and did not evaluate whether those standards satisfied the criminal definition (worse, the court added standards not contemplated under a criminal definition, which

are discussed in the next two sections of this petition).

Even in the criminal law, a definition of willfulness as deliberate and intentional conduct is approved. It is commonplace that "[i]gnorance of the law, which everyone is bound to know, excuses no man. A mistake in point of law is in criminal cases, no sort of defense." Black's Law Dictionary, 4th Ed. at 881, citing Blackstone. It is just as axiomatic that a defendant in a criminal case is presumed to intend the natural and probable consequences of his actions. Thus, an act may be deemed to be willful in the criminal law if the actor intends the result which actually occurs, i.e., if that result is not accidental or involuntary. This position was articulated by Judge Learned Hand in the often-cited case of American Surety Company of New York v. Sullivan, 7 F.2nd 605, 606 (2nd Cir.,1925):

> "The word 'willful', even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." (Emphasis supplied).

For over half a century, Judge Hand's definition of "willfulness", which is directly contrary to the lower court's definition, has been followed in innumerable cases construing the term as used in federal criminal statutes. See, e.g., Fields v. United States, 164 F.2d 97, 99 (D.C.Cir., 1947) (Contempt of congressional committee); McBride v. United States, F.2d 249, 254 (5th Cir.,1955) (falsification of narcotics records); United States v. Couming, 445 F.2d 555, 556 (9th Cir.,1971) (selective service). Accord, United States v. Allen, 317 F.2d 777 (2nd Cir.,1963); United States v. Hull, 346 F.2d 875 (2nd Cir.,1965); United States v. Byrd, 352 F.2d 570 (2nd Cir.,1965). In these cases, the court frequently looked to the specific purpose of the statute which it was construing before settling on the American Surety meaning of "willfulness", as opposed to another definition.

The purpose of Sec. 210 mandates an expansive interpretation of "willfulness". The fact that this word has been given the same meaning in a criminal (Section 208(a)) and a civil (Section 210(b)) provision should provide evidence that the word does not import into the statute any "specific intent" or "evil motive"

test, for such a test is unheard of in the civil law.

In the analogous case of the civil penalty imposed pursuant to 26 U.S.C. § 6672 for "willfully" failing to collect withholding taxes, it has been held that the term means a voluntary, conscious and intentional failure to withhold, and that no bad motive or intent to defraud need be shown. Harrington v. United States, 504 F.2d 1306, 1316 (1st Cir.,1974); Kalb v. United States, 505 F.2d 506, 511 (2nd Cir.,1974); Burden v. United States, 486 F.2d 302 (10th Cir.,1973), cert. denied, 416 U.S. 904 (1974), Newsome v. United States, 431 F.2d 742, 745 (5th Cir.,1970); Pacific National Ins. Co. v. United States, 422 F.2d 26, 33 (9th Cir.,1970), cert. denied, 398 U.S. 937 (1970); Monday v. United States, 421 F.2d 1210, 1215-1216 (7th Cir.,1970). No contrary instance has been found in which the word "willful" in a civil statute connotes a specific intent or bad motive.

A broad definition of the criminal meaning of the word "willful" was adopted by the only other court to consider this question in the context of a suit for overcharges. In Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y.,1975),

Judge MacMahon, a district judge well seasoned in criminal trials, held that:

> "While it is true that 'the term willful overcharge must not be construed in the criminal sense', this does not mean as defendant suggests, that defendant must have specifically intended to violate this particular law or even that it must have been aware that its conduct was against the law. Willful, when construed in the ciminal sense, simply means that defendant must have known what it was doing, that it acted voluntarily, deliberately and on purpose, and not because of mistake, accident, carelessness or other innocent reason." (Emphasis supplied).

This is merely a paraphrase of the standards used by the trial court in the present case.

The cases cited by the lower court do not support its contention that willfulness in an overcharge case must connote a specific intent to violate the law.

In Manning, supra, the lower court held that an overcharge made before the imposition of price controls, although relating to a service to be performed after that imposition, could not be considered willful. The defendants

rebutted a charge of willfulness by immediately offering to refund the alleged overcharge. The Manning case can therefore be explained far more clearly as a specialized example of inadvertence or accident that as a case establishing any broad definition of willfulness.

Futura[1] and Gulf[2] were criminal cases interpreting Section 208(a) of the Economic Stabilization Act. In Futura, the court held that a landlord who had made an obvious effort to persuade his tenants to help him circumvent the law had acted willfully within the meaning of Section 208. In Gulf, the court held that willfulness was a question of fact which could not be addressed on a motion to dismiss. Neither case held that willfulness could not exist in a case where it was shown that the defendant intended to charge the price which in fact was charged, at a time when the charging of the price was unlawful.

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1 U. S. v. Futura, Inc., 339 F.Supp 163 (N.D.Fla.,1972).

2 U. S. v. Gulf, 408 F.Supp. 450 (W.D.Pa.,1975).

In view of the foregoing considerations, it is clear that there is ample support in the legislative history and applicable judicial precedent for an interpetation of the word "willful" which would comport with the standards used by the trial court, even when those standards are judged under criminal law. The word "willful", as used in the Act, was not intended to require specific knowledge by the seller that the price charged exceeded the price that would result from proper application of the pricing formula, or proof that the seller acted with an evil purpose or bad motive. In the typical price overcharge case, a willful act is one which results in the plaintiff being charged the price which defendant intended to charge him, which price is at that time unlawful. A willful overcharge, as held by the trial court, is one which:

> "is deliberate, or...is the natural and probable consequence of actions...which are voluntary and intentional or which are in reckless disregard of the applicable regulations, as opposed to being a bona fide error notwithstanding the maintenance of procedures reasonably adopted to the avoidance of such error."

Further evidencing the fact that the overcharge was willful, under any test, is the court's Finding of Fact No. 24 (App. D):

> "24. The overcharge was willfully made, defendants having deliberately and intentionally manipulated application of the formula, with which they evidenced thorough familiarity, from the time that Mr. Burns and the attorneys began collaborating regarding calculations, for the evident purpose of preventing recoupment of overcharges through proper application of the formula. Under the circumstances, it is clear that any request for refund on the part of the plaintiffs, prior to suit, would have been ignored by defendants."

Respondents displayed a thorough knowledge of the applicable regulations, but wholly failed to follow those regulations and failed to maintain "procedures reasonably adapted to the avoidance" of error, a consideration of diminished materiality since Respondents deliberately imposed and persisted in deliberately maintaining the overcharges. The overcharges were not the result of a "bona fide error", such as innocent miscalculation, but were the

intentional actions of the Respondents. The trial court's determination of willfulness is based upon its conclusion that the overcharges were deliberate, and were the natural and probable consequences of actions which were voluntary and intentional and in reckless disregard of the applicable regulations. Under these findings, a verdict of "guilty" of a crime requiring scienter would be upheld, for it is settled that a defendant must be presumed to know the law, and must also be presumed to intend the natural and probable consequences of his actions. Therefore, a deliberate overcharge, or an overcharge which is the natural consequence of voluntary, intentional acts by the Defendants, or acts in reckless disregard of the pricing regulations, is willful under criminal standards. In this respect, the lower court's indication that the trial court based the finding of willfulness on simple negligence is incorrect and is rebutted by both the trial court's findings and the record, which make it clear that Respondents were guilty of much more than simple negligence.

In the final analysis, it must be determined whether the risk of a conscious decision to charge a given price will fall upon the seller,

who chooses to charge that price, or upon the innocent purchaser. The Congressional intent dictates that the risk should fall upon the seller. The result reached by the lower court means that a seller can either ignore or abuse the regulations, and argue that it was acting in good faith, and without "evil motive", i.e., specific intent to charge an unlawful price, and so escape penalty and/or suit without notice. This determination will inevitably lead to subversion of the regulatory scheme, and will eviscerate the clear intent of Congress.

(b) The lower court is incorrect in its holding that an overcharge must have been made with the specific intention of charging a price which the Respondents knew was in excess of the ceiling price allowable under applicable pricing laws and regulations.

In holding that to be willful an overcharge "must have been made with the specific intent of charging a price which the defendant knew was in excess of the ceiling price allowable under the applicable pricing law and regulations" the lower court ingnores existing criminal law and adds an element to a Plaintiff's burden of proof which will virtually eliminate the

imposition of penalties for overcharges. This language provides an invitation to sellers to totally disregard pricing regulations. It gives validity to a plea of "ignorance" as a complete defense to penalties. It disregards the presumption that a defendant is held responsible for natural and probable consequences of his actions. The Respondents were aware of the applicable regulations and the duties imposed upon them from the outset, but chose to ignore those duties. This court's opinion may well provide a haven for them and others who totally ignore, or make no bona fide effort to comply with the regulations, for they will be able to plead that they did not know that their prices exceeded that which is authorized since they made no attempt to determine the ceiling price. This incongruous result obviously is not in accord with criminal law, nor the regulations governing pricing, which have consistently, through all amendments, made it clear that the base price (both during the freeze period and after) and any additions to base price must be determined in accord with the terms of the regulations. Under the regulations, no price in excess of the base price is authorized except

when calculated in accord with the pricing formula. (See discussion infra.) But the lower court's opinion allows the seller to charge any price it desires without penalty, so long as it does not know that the price exceeds the allowable ceiling price. The seller is, in effect, encouraged to ignore the regulations in setting his price, and thus escape knowledge of his overcharges and, hence, the penalty. Surely this illogical and inequitable result can not stand.

(c) The lower court incorrectly held that there must be "clear and convincing proof that an overcharge was willful".

The lower court added a standard of proof that is not encompassed by the Economic Stabilization Act, the Emergency Petroleum Allocation Act, or the regulations thereunder, in making the observation that there "must be clear and convincing proof that an overcharge was willful". There is no justification for adding to the civil burden of proof. The fact that the civil tribunal is called upon to apply a criminal definition of willful does no mean that the burden of proof is changed. In order to invoke the "clear and convincing" standard in a civil case,

and thereby depart from the ordinary civil standard a basis either in statute or administrative regulation must be found. There is none in this case. There is no warrant for changing the burden of proof by judicial fiat.

The definition of willfulness in the context of the pricing and allocation regulations is of utmost importance. The Congressional intent in providing self-regulatory features is subserved by an unrealistic (and unauthorized) definition of willfulness and an equally unrealistic (and unauthorized) burden of proof. The lower court's opinion is not in accord with established legal principles or the language of the Acts in question or the intent of those who enacted them. The opinion will undoubtedly hamper private enforcement and provide encouragement to those who make no bona fide effort to comply with pricing regulations. It is respectfully submitted that a matter of this importance deserves the attention of this Court.

2. The trial court correctly determined that Respondent Longview Refining Company violated the price "freeze" order.

Executive Order No. 11723, 38 F.R. 15763, June 15, 1973, provides in Section 1:

> "Effective 9:00 EST, June 13, 1973, no seller may charge to any class of purchaser, and no purchaser may pay a price for any commodity or service which exceeds the freeze price charged for the same or a similar commodity or service in transactions with the same class of purchasers during the freeze phase period. This order shall be effective for a maximum of sixty days from the date hereof, until 11:59 P.M. EST, August 12, 1973. It is not unlawful to charge or pay a price less than the freeze price and the lower prices are encouraged."

Section 2 of the Order provides that each seller shall prepare a list of freeze prices and maintain a copy available for public inspection during normal business hours. In addition, the calculations and supporting data are required to be maintained by the seller, to be made available on request to representatives of the Economic Stabilization Program.

Section 8 of the Order contains the following definitions:

> "'Freeze Price' means the highest price at or above which at least 10% of the commodities or services concerned were priced by the seller, and transactions with the class of purchaser concerned during the freeze phase period. In computing the freeze price, a seller may not exclude any temporary special sale, deal or allowance in effect during the freeze phase period.
> "Class of purchaser' means all those purchasers to whom a seller has charged a comparable price for comparable commodities or services during the freeze base period pursuant to customary price differentials between those purchasers and other purchasers.
> "'Freeze base price' means (a) the period June 1st to June 8, 1973, or (b) in the case of a seller who had no transactions during that period, the nearest preceding seven-day period in which he had a transaction.
> "'Transaction' means an armslength sale between unrelated persons, and is considered to occur at the time of shipment in the case of commodities, and in the time of performance in the case of services." (Emphasis supplied).

From May 25, 1973 through approximately June 7, 1973, the prices in effect

at Longview Refining for all customers were .1600 cents for regular gasoline, .1800 cents for premium gasoline, and .1500 cents for diesel fuel. (P. Ex. 1, p. 1) As of June 7, 1973, the prices were changed, making the prices .1725 cents for regular gasoline, .1925 cents for ethyl gasoline, and .1625 cents for diesel fuel. (P. Ex. 2, p. 4; price book information obtained from Respondent Longview Refining).

Longview Refining maintained a multi-price level, i.e., charged different prices to different customers, until the enactment of the price increase effective May 25, 1973. Thereafter, and at all times during the freeze period, all customers were charged the same prices. (However, Respondents claim an early, i.e., June 4th price increase to American Petrofina, which was retroactively invoked). There was no distinction in customers as to price, and no separate classes for pricing purposes within the meaning of Section 8. (R.[3] 30-31, P. Ex. 2).

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3 "R" refers to the two volumes of the "Record of Proceedings", which contains a transcript of the trial testimony.

Longview Refining Company did not sell at least 10% of the gasoline and diesel fuel sold during the period June lst through June 8th, at the higher prices of .1725 cents for the Executive Price Freeze Order was announced) a debit memorandum was issued raising prices to American Petrofina to the level of .1725 for regular gasoline, .1925 for premium gasoline, and .1625 for diesel fuel, retroactive through June 4, 1973. (R. 452).

French Peterson, who was then President of Longview Refining Company, testified repeatedly that on June 6, 1973, he had given instructions to "Reba" and "Buck" (employees of Longview Refining Company) to raise prices to all customers. (R. 439, R. 477, and R. 400). Peterson candidly admitted, "I was afraid we were going to have a freeze," (R. 430) "...and I might add, counsellor, if you expect a freeze to come, you better get all you can, becuase you can always cut your prices after the freeze goes off; otherwise you might go out of business." (R. 456). "...I wanted a price I could live with if it were frozen". (R. 456).

Mrs. Reba Morrow testified that she received a phone call from Mr. Peterson

instructing her to put the increased price in effect for all customers at the same time. (R. 473). She did not recall whether the date was the 4th, 5th, or 6th of June. (R. 472-3). She stated that despite daily working with prices, invoicing, and manifests, it was not detected that American Petrofina's price was not raised until the 16th of June. (R. 473-5). She could offer no explanation as to why all customers were being charged one price and American Petrofina being charged another price, nor could she explain why the fact was not detected earlier than June 16th. (R. 474).

Considering all purchasers during the period June 1st through June 8th,[4] the

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4 Although the Executive "freeze" Order speaks in terms of a period of June 1st to June 8th, 1973, (Sec. 8(a)), or a "preceding seven-day period" (Sec.(b)), interpretative commentary of the Cost of Living Council embodied in question and answer form is as follows:

"Q Is the freeze base period of the first seven days in June or the first eight days in June?

A The freeze base period is the first eight days in June 1973; June 1st through June 8th. If no transaction occurred during that period, the nearest preceding seven-day period in which a transaction occurred is used as the freeze base period."

retroactive billings to American Petrofina through June 4th, are necessary in order to assure that at least 10% of the total purchases were at the increased prices. Backbilling American Petrofina to June 6th will not suffice.

Inconsistency in Respondents' position was evident. According to French Peterson, a call was made on June 6th giving instructions to raise the price to all customers immediately, but there was not mention of placing the price increase in effect earlier (on June 4th) for American Petrofina (alone). Accepting the contention of clerical error, and putting in effect the price increase for American Petrofina the same day as the increase became effective for other customers, i.e., on June 6th, the result of 10% of total sales at the higher prices is not achieved. It is obvious, therefore, that even if there was bona fide clerical error in failing to put the increase in effect originally, when the oversight was detected on June 16, the benefit of hindsight was deliberately used in order to retroactively "back-bill" through June 4, thus

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4 (cont) Accordingly, the computations were made on the basis of an eight-day period.

achieving sufficient sales at the highest prices to justify the "freeze" charges at the higher levels.

Accordingly, it is apparent (and the trial court correctly held) that the retroactive billing through June 4th was a device used to achieve justification for charging the increased prices during the freeze period.

Even if this were not true, under the definition of "transaction" contained in Section 8 of the "Freeze" Order, the prices that must control are those which are actually charges at the time of the sales in question, and not subsequent additions through retroactive billings or debit memos. Otherwise, the door would be open to fraud, for there would be no practical way to distinguish between a genuine billing error and a device to achieve higher prices.

Therefore, the Respondent Longview Refining Company made illegal overcharges during the freeze period, which, based upon gallons of regular, premium and diesel purchased by the Petitioners, as shown on Page 2 of P.Ex. 2, amount to $73,027.59. This figure was not challenged by the Respondents, despite which the lower court picyunishly observed that the trial court's finding of the overcharge was

not sufficiently definite because it did not allocate the overcharge to each Petitioner, which is simply a matter of mechanical calculation (with J. C. Bell excluded because he could not furnish his purchase figures).[5] This certainly does not constitute a basis for reversal of the trial court's findings with respect to the freeze period overcharge.

It is also clear, as particularly evidence by the testimony of French Peterson, that the overcharge was willful and an evasion of the order, entitling the Petitioners to the assessment of penalties. Mr. Peterson stated that the instruction was given to raise prices to all customers at the same time. Yet, three days after the "freeze" order became effective, American Petrofina was "back-billed" so that its prices were retroactively raised effective two days before the price increase to other

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5 In this same view, the lower court observes that the regulations under which the trial court decided the case was not "in effect" at all times during the overcharge period. But the opinion does not point out an instance where a change in the regulations is pertinent to the questions under consideration. The observation, therefore, is meaningless and superfluous.

is apparent that the trial court was justified in finding a willful evasion of the order, even under the unauthorized tests laid down by the lower court. At the time of back-billing, Peterson knew that the higher price would not be authorized unless the price increase was made retroactive to June 4th. The evidence of manipulation is "clear and convincing".

Petitioners did not discover the overcharge during the freeze period until after suit was instituted and during the course of discovery. Respondents denied the overcharge from the time the issue was first raised, and still deny it. Any extra-judicial request for refund of the concealed overcharge would not only have been impossible prior to suit, but obviously would have been futile if made, and would be futile now if this case were abated to allow such a demand. The transparent sham, which justified the finding of a willful overcharge, compels the finding that a demand for refund would have been useless.

The lower court based reversal of the trial court's freeze period overcharge determination on the trial court's application of a civil standard of willfulness, and failure to find

individual overcharges with respect to each Petitioner. In light of the discussion of willfulness in the first portion of this application, and the evidence which justified the finding of willful, knowledgeable manipulation, it is evident that the "willful" point does not justify reversal, and failure to allocate the overcharges to each Petitioner clearly does not require retrial.

The lower court also noted Respondents' contention that American Petrofina was in a separate "class", but did not assign this as a basis for reversal. Clearly no "class" question is involved in the freeze period overcharge. As the lower court conceded, albeit in a footnote (No. 22, page 19, App.) on May 25, 1973, Longview Refining began charging all customers the same prices, and Respondents' attorneys stated in a letter that "since June [Longview has] had only one class of gasoline purchasers". P.Ex.6, Ex. P. 118. The "freeze" went into effect in June and the freeze measurement period was in June, so the "freeze" obviously concerned only one class consisting of all purchasers.

The lower court's observation that Mr. Peterson testified that Petrofina's price

increase was to have been effective June 4, 1973, is not supported by the record. Instead, Mr. Peterson testified repeatedly that the order to increase price to all customers had been given on June 6 (which date will not serve to justify the higher pricing). This treatment of the facts is akin to Mr. Peterson's back-billing with hindsight knowledge of the Presidential "freeze" Proclamation. The lower court's observation in the last part of its opinion that the testimony of American Petrofina should be obtained is, therefore, wholly without purpose or legal effect.

In summary, the Court should have sustained the trial court's finding of overcharge during the freeze period, for the evidence clearly sustains the court's finding, and no useful purpose would be served in relitigating that which has already been properly determined. It is undisputed in this record that the freeze period overcharge was not, and could not have been discovered except through discovery pursuant to this litigation.

The law does not require a meaningless, futile gesture, (presuit notification) and certainly does not require an act which would have been impossible, as in the present

situation. Therefore, even disregarding the question of willfulness, no presuit notification was necessary, and the trial court's finding of the freeze price overcharge should have been sustained. The finding of willfulness also should have been sustained for the facts compel a finding of willfulness under any construction of the term and there is no need for reversal simply because the trial court did not find the amount of Petitioners' individual purchases or individual overcharges in any sum certain. The record clearly demonstrates the total overcharge as to all Petitioners, and the respective amounts of their purchases (with the exception of J. C. Bell, who failed to prove his purchases and therefore was not included in the overcharge calculation). It requires simply a mechanical calculation to determine the respective share of the damages attributable to each Petitioner. This certainly is not a basis for requiring a new trial of the "freeze" overcharge. The opinion of the lower court clearly should be reversed on this issue.

3. The trial court correctly determined that Respondents overcharged

Petitioners under pricing regulations which followed the "freeze" order.

(a) Failure to make an effort to follow the pricing regulations constitutes a legal wrong.

After August 19, 1973, refiners were required to determine their pricing pursuant to a formula specified in 212.83(c)(2) of 10 C.F.R. Chapter II, and its predecessor Part 150.355.

Through the application of the formula a refiner is permitted to determine the increment per unit, (i.e., the amount per gallon) of increased cost per particular product (gasoline, diesel, etc.) accruing after May 15, 1973, and add such increment ot the base price of the product, i.e., the respective prices charged to each class of customers for the particular product as of May 15, 1973. The resulting price is the price for the particular product to the repsective class of customer for the "current month", i.e., the month for which the price is established.

Section 212.82(a) provides that a refiner may not charge to any class of purchaser a price in excess of the base price except to the

extent permitted pursuant to the provisions of Paragraphs (c) through (k), the reference being to the pricing formula and rules relating thereto. Section 212.82(f) says that the base price is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned, on May 15, 1973, plus increased product cost incurred between the month of measurement and the month of May, 1973, and measured pursuant to the provisions of Sec. 212.83 (which contains the formula for allocating increased cost and determining the increment of increased cost which may be lawfully added to the May 15, 1973 base price).

Section 212.82(f) also provides:

"In computing the base price, a firm may not exclude any temporary special sale, deal, or allowance in effect on May 15, 1973."

Section 212.82(f)(2)(i) provides in pertinent part:

"In computing base prices for special products, a refiner may not increase its May 15, 1973 selling price to each class of purchaser more than once in any calendar month to reflect the increased product cost allowable pursuant to the provisions of

Sec. 212.83 the adjustment specified in Paragraph (f)(2)(ii) of this section or the incentive factor permitted pursuant to Sec. 212.84 but may implement the increase on any day during that month."

Section 212.83(c)(l)(i) provides:

"Special products: [gasoline and diesel fuel are included in the definition of special products] In computing base prices for sales of special product, a refiner may increase its May 15, 1973 selling prices to each class of purchaser once each calendar month, beginning with November, 1973, by an amount to reflect the increased product cost attributable to sales of that special product, using the differential between the month of measurement and the month of May, 1973, provided that the amount of increased cost used in computing a base price is calculated by use of the general formula set forth in paragraph (c)(2)(i) of this section...". (Emphasis supplied).

The intent of the pricing regulations is to hold prices to the May 15, 1973 level adjusted on a month to month basis (not more than once each month) to allow the "pass through" of permissible increased cost to be determined in accordance with the

formula. The formula is simply a method by which the refiner determines an increment to be added to the May 15, 1973 base price which will allow him to recover his additional crude cost incurred in prior months. An increase over the May 15, 1973 price is permissible only through application of the formula. The wording of the regulation clearly mandates that no increase is to be permitted if the formula is not used. Since the Respondents made no bona fide effort to follow the formula during the overcharge period (as illustrated by discussion of the evidence, infra) the entire amount charged in excess of base price is "overcharge". The trial court leniently allowed the overcharges to be decreased by proper calculation of the formula.

But despite the clear wording of the regulations, the lower court stated that the failure of a defendant to perform the mechanical calculations under the formula in arriving at the price charged for covered products does not in and of itself result in an overcharge. The literal application of this proposition will provide additional comfort to violators. The statement is true only where the base price is charged. Section 212.82(a) provides that a refiner may not

charge any class of purchaser a price in excess of the base price except to the extent permitted pursuant to the provisions of Paragraphs (c) through (k), the reference being to the pricing formula and rules relating thereto. The same provision was found in Section 150.355(b) as amended in 39 F.R. 809 (January 3, 1974). The meaning is clear, i.e., that in order to justify an increase over base price, the defendant must make a bona fide good faith effort to determine allowable increased cost pursuant to the formula. It has not been suggested that a defendant must be held to be the insurer of the accuracy of his calculations, but there is no authority, and no excuse for deliberately ignoring, (or manipulating) the formula (as Respondents have done).

If, as the lower court holds, a defendant may ignore the formula, though he knows he is supposed to calculate prices in accord with it, and be given the benefit of a "no legal wrong" finding in the fortuitous event that the price charged does not exceed that which is permitted, then it is only logical that he must accept the danger that the price will exceed the maximum permissible and, since he willfully ignored the formula, be held to have willfully affixed an

improper price. The lower court's opinion is to the contrary, for it holds that the overcharge is willful only where the seller knows his price is in excess of the permissible ceiling price. Thus, the would-be violators are given the best of all possible worlds, while buyers must suffer from an illogical and inconsistent opinion.

(b) The trial court correctly ruled that Respondents are not entitled to consolidate operations for pricing purposes.

When Mr. Sanders, the certified public accountant retained by Petitioners, first endeavored to ascertain the validity of the Respondents' pricing, he visited the offices of Crystal Oil Company in Shreveport. (R. 15) He was introduced to Mr. Leeseman, who was identified as Manager of Refining for Crystal Oil Company. Mr. Sanders asked to see the calculations that Crystal had made in order to determine the price under Phase IV regulations. Mr. Sanders then gave this testimony (R. 16):

"Q What was Mr. Leeseman's response?

A Said he didn't have any.

Q Did he say whether or not they had followed or reviewed the formula that was applicable at that time for pricing?

A He said he had read it but didn't understand it and made no attempt to apply it.

Q Did he give you any explanation as to how the prices that were in effect at that time or the price changes that had occured came about?

A Yes. He said that Mr. Morgan supplied him a figure which he said would be the price of crude in that month or his estimate of the price of crude in that month, and they divided that by 42, and that's what they added to the price.

Q Was that pretty well the extent of the conversation that you had with Mr. Leeseman about what had been done at that particular point in time?

A Yes. He gave me a sheet, showed me how he had arrived at the price he had arrived at, and then we went to Longview." (Emphasis supplied).

The sheet referred to appears at Page 4 of P.Ex. 6. The sheet shows an effective price schedule at various dates, and three price increases occurring during the month

of December (1973). None of these prices were, or could have been, arrived at through application of the formula contained in the pricing regulations, as is made abundantly clear by the record. The testimony concerning Mr. Leeseman's representations relating to the failure to follow the formula was not disputed or denied by the Respondents.

Mr. Donald Burns, accountant for the Respondents, also testified with relation to Respondents' actions in regard to pricing. He stated that after consultation with Mr. Houghton, one of the attorneys for the Respondents, "We determined that we could legally - scratch that - we determined that a consolidated basis was the proper basis to perform the calculations." (R. 482) However, though this determination was made around March, the consolidated basis was not actually used until July or August. (R. 482)

Mr. Burns conceded that it was required that the formula be used to make changes from the May 15, 1973 base price. (R. 527). It is clear from cross examination, however, that the formula was never used by Respondents to establish prices. Prices for December 1973 and January 1974 were established

through Mr. Leeseman's method, already described. (R. 527) Mr. Burns then determined that the formula had not been applied "properly," and stated "the first time I applied the formula as I determined it was for February." (R. 528) At that time, however, the formula calculations were made by Mr. Burns individually for each subsidiary (e.g., individually for each subsidiary (e.g., individually for Longview Refining Company), as opposed to being made on a consolidated basis. (R. 528). And though, as noted earlier, Mr. Burns and Mr. Houghton determined that Crystal could "legally" determine the formula on a consolidated basis as of March, the consolidated basis was not actually used in calculations until July or August. No explanation appears in the record as to what, if any, calculations were used in March, April, May or June.

Even though Mr. Burns purported to make individual calculations in February, he did not take into account the admittedly large accumulated overcharge. Witness the following testimony: (R. 539, et. seq.)

"Q I would like to read then to you the first paragraph of that letter (from Tom Houghton, attorney for Respondents, to the Federal Energy Office, dated March 8, 1974.). It says "Longview Refining Company of Longview, Texas, a wholly-owned subsidiary of our client Crystal Oil Company, of Shreveport, Louisiana, during the months of December 1973 and January 1974 incurred overcharges to wholesale purchasers of gasoline and diesel fuel as a result of overestimates of the cost of crude to be run during those months. The exact amount of aggregate overcharge during the period has not yet been determined, because final billings by crude suppliers have not yet been received. However, it seems likely that amount will be quite substantial.' All right, did you make those calculations to show what that overcharge was?

A I made those calculations based on incorrect assumptions.

Q And that incorrect assumption being that you should apply the formula on the basis of Longview Refining Company individually.

A That is one of them, yes.

Q That's just one of them. What---?

A That's the major. We changed several interpretations as we went along.

Q To eliminate the overcharge?

A No, because of a different interpretation of the formula.

Q Now, how much was the overcharge as you calculated it to be, regardless of whether on incorrect assumptions or not, Mr. Burns.

A At what point in time?

Q Sir?

A At what point in time?

Q As of the time of this letter, March 8, 1974.

A I don't recall. It was probably in the neighborhood of five hundred thousand.

Q That was just for gasoline, wasn't it? The five hundred thousand or so?

A I believe so, yes, gasoline.

Q Another hundred thousand or so for diesel, wasn't it?

A That's correct.

Q About six hundred ninety-two thousand altogether according to your calculations at that time, wasn't it, Mr. Burns?

A It might have been. I don't know exactly.

Q Do you recall this language in the same letter that appears on the second page, the third paragraph of the leter, 'In view of this threat and in order to avoid exposure to double recoupment, Longview both has refused to make refund to any party for the December and January overcharges and is presently determining its price under the formula so that the amount of overcharges for those months will not be recoupled in future months pending official investigation by the Federal Energy Office. Do you remember that?

A Yes.

Q So that in your future calculations as they applied to Longview Refining Company you did not take into account the G factor represented by this approximately $692,000 in overcharges, did you?

A I took in the G factor that occurred after January 31. The portion of the G factor that occured prior to January 31 I excluded.

Q And that would include the approximately $692,000.00 in overcharges?

A If that was a correct figure.

Q If that's a correct figure?

A Yes, sir."

Further compounding and complicating this picture were Mr. Burns' admissions that though he has made numerous calculations on one basis or the other, from and after February, 1974, none of such calculations can be tied to any price increase or any price charged by Longview Refining. Witness the following testimony: (R. 527, et. seq.)

"Q All right. To get this amended base price--in other words, to make your change from May 15, 1973, you are required to use the formula, aren't you?

A That is correct.

Q When did Longview Refining Company or Crystal ever first start using the formula on any basis?

A The first that I am aware of is December. There may have been one before that.

Q December, 1973?

A That is correct.

Q Sir, didn't you join the company in December of 1973?

A December 26.

Q And didn't you for a month or more work and try to find out what had been done and then try to set up the company on the formula?

A That's right.

Q And wasn't it, in fact, the first of February before you ever got the formula in application?

A No sir.

Q Isn't that what you told us heretofore, Mr. Burns, Mr. Sanders and I?

A No. As a matter of fact, what I told Mr. Sanders and you is that they did not apply the formula properly and that the first time I applied the formula as I determined it was for February.

Q When you did that, when you first applied it for February, you did it on the basis of Longview Refining Company as a separate individual entity, did you not?

A That's correct.

Q And you were doing the same for Adobe and Berry and the other refining subsidiaries.

A At the time it was just Adobe and Berry. Crystal Princeton was not in operation at that time.

Q So you couldn't even have consolidated Crystal Princeton at that time, could you?

A No...

Q All right, sir. Would you now tell me then for the record what supporting documents or data do you have showing how the price here shown to be in effect on December 1st, 1973, was arrived at?

A I have nothing.

Q The second price that shows to be effective on December 1st which was retroactive from December 4, 1973, what do you have to show how that price was arrived at?

A I believe you already have Mr. Leeseman's calculations of that price.

Q The sheet that Mr. Sanders identified in one of his exhibits?[6]

A That's correct.

Q You have seen that sheet, have you not?

A I have.

Q It does not in any way, shape, form or fashion purport to apply the formula does it sir?

A It purports to apply the formula as Mr. Leeseman interpreted it at that time....

Q Now show me what you have then to support the price that was first notified to be effective December 20, 1973, and then on December 31st, 1973, deferred to January 1st, 1974.

A I was not involved in that price increase, and we could not locate any documents for it, but Mr. Leeseman, I understand, prepared those calculations, and he's no longer with the company.

Q And you are unable to locate any supporting entries to show that the formula was applied?

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[6] The reference is to the sheet identified by Mr. Sanders, which had no relation whatever to the formula, a fact admitted by Mr. Leeseman.

Q On any basis, whether consolidated or individual or any basis?

A I do not know that it did not exist.

Q What do you have then to support the price increase of January 3rd, 1974, which was noticed on January 2nd, 1974? What supporting documents do you have to show application of the formula for that price increase?

A Once again, I was not involved with that price increase.

Q Do you have anything? Do you know of anything?

A No, I don't know of anything.

Q Have you ever seen anything?

A I may have. I don't recall.

Q What do you have then to support the price increase of February 5th, 1974?

A I could not find that in the records in my calculations. This is a price decrease, and it was done -- the calculations for it were done in Houston by Tom Houghton and myself. I could not locate them.

THE COURT: How do you spell that last name?

THE WITNESS: H-o-u-g-h-t-o-n.

THE COURT: Oh, Mr. Houghton here?

THE WITNESS: That's Mr. Houghton in the courtroom.

Q You and Mr. Houghton did that, but you can't find the backup to show what was done or how it was done?

A No, I have stacks and stacks of files, but I couldn't find it, no, sir.

Q What do you have to support the price increase as of March 9, 1974?

A I would like to make one thing clear at this point. I did not set the price. I merely advised on them.

Q Do you have anything to show, though, what calculations were done, how the formula was applied ---?

A I have quite a few stacks of work papers, yes, sir. They will not tie directly to this, because I did not set the prices.

Q Are you referring now to those computer runs that you showed us?

A Not for the March 9th, no, sir.

Q Were there any computer runs for the March 9th price increase?

A No.

Q You say you have some work papers relating to the March 9th price increase, but they will not tie to the price increase. Is that correct?

A That is correct...

Q Going to the price increase of April 15, 1974, what supporting documents or data do you have to show the application of the formula to arrive at that price?

A I have a whole file full of work papers supporting each of these calculations.

Q Well, sir, do you have one that shows the April 15, '74 price?

A My calculations will not tie to those prices.

Q You have some work papers but they will not tie to the prices?

A That's correct.

Q Because you did not set the prices?

A That is correct.

Q All right, sir. Do you know who else has any work papers that would support that and show application of the formula to arrive at that price?

A No, sir, the prices were set as a result of oral conversations, and they were not done on a calculated basis -- scratch that -- they were done on the basis of my calculations. I made estimates in my calculations. These estimates were adjusted.

Q Who adjusted them?

A Mr. Morgan.

Q Mr. Morgan didn't necessarily, though, go by the figures that you may have arrived at through your calculations and your endeavors to apply the formula, did he?

A He went by my calculations, adjusting the wrong assumptions that I made.

Q He took them and adjusted your assumptions and arrived at some price. Those prices will not tie to your calculations?

A That's correct.

Q Is that the sum and substance of it?

A That is.

Q Is that true then for that next price, May 4th?

A Yes, it is. I believe that starts with computer runs. I believe my computer runs go to that.

Q The few computer runs which you showed us, in addition to Mr. Leeseman's sheet as being a backup, didn't start until May then, 1974. Is that correct?

A I believe I have before then, but May is the first ones I could locate. I'm not certain as to what day they started.

Q Well, would this same process remain true right up to this good day, Mr. Burns, for setting prices?

A Except that we're doing it consolidated, yes" (Emphasis supplied).

In summary, Mr. Burns testified that when he joined Crystal Oil Company on December 26, 1973, he determined that the formula had not been applied properly (by Mr. Lesseman). Mr. Burns first made calculations for the month of February, 1974, for Longview Refining Company as a separate entity. There was a large overcharge (in excess of $600,000.00) which he disregarded. These calculations were subsequently abrogated by calculations on a "consolidated" basis commencing in July or August, 1974, which purported to wipe out the overcharge. Compounding this tale of knowing

disregard and manipulation of the regulations is the unabashed testimony that no calculations known to exist will tie to any price set by Respondents during the pertinent period, not even these calculations required to be filed with the Federal Energy Office. This is because Mr. Morgan, president of Crystal, would correct Mr. Burns' "assumptions" and set the price at some figure which would not tie to the calculations. The only prices ever charged by Respondents after the inception of the regulations which were tied to any supporting documents are those shown on Page 4 of P.Ex. 6, being Mr. Leeseman's price figures which were admitted by Mr. Leeseman as having no relation to the formula.

The "consolidated" approach to the formula was first employed in July or August, well after the overcharge period, but is used to "eliminate" the overcharge. There is no explanation of the method of setting prices in the interim period between February and July or August. The overcharge-eliminating consolidated prices still does not tie to formula calculations because prices have been left to the ultimate determination and control of Mr. Morgan.

The entities, i.e., subsidiaries of Crystal Oil Company, consolidated for price calculation purpose are Longview Refining Company, Berry Refining Company, Adobe Refining Company, Crystal Princeton Refining Company, High Octane Terminal Company, Crystal Petroleum Company, Tulsa Oil Company, and Stone Independent Disbributors. (R. 483). Longview, Berry, Adobe, and Crystal Princeton are refiners. High octane, a blending company, was also considered a refiner. The remaining companies-Crystal Petroleum, Tulsa, and Stone--are retailers. All other subsidiaries of Crystal Oil Company were ignored in the consolidation, as was Crystal Oil Company, the parent. (Crystal Oil Company is engaged in production, supply and distribution. It does not operate gasoline stations, and is not engaged in refining.) (R. 525)

Through the consolidation, the Respondents took costs applicable to all consolidated companies back to August, 1973, averaged such costs, arrived at an allocation factor, and apportioned costs between all the companies. (R. 547) The incongruity of this approach is illustrated by the fact that Longview

Refining Company was not owned by Crystal Oil Company on August 1, 1973, not being acquired until November 1, 1973. (R. 547). Adobe Refining Company also was acquired after August, i.e., on November 30, 1973. The financial statement of Crystal Oil Company shows that Crystal-Princeton was acquired on December 14, 1973, but did not begin refining operations until July, 1974, well after the overcharge period. (R. 548) Therefore, three refineries packaged in the consolidation were acquired by Crystal Oil Company well after the pricing regulations went into effect, and after overcharges had been incurred, and one was not in operation until after all overcharges during the pertinent period.

"Refiner" is defined as a "firm" other than a reseller or retailer. Sec. 212.31. A "firm" may be treated by the F.E.O. as a parent and consolidated entities, or a parent and a consolidated or unconsolidated entity, or an unconsolidated entity, or "any part of a firm." Sec. 212.31. In this overcharge case, the court, of course, exercised the same power and function as the F.E.O., and was certainly justified on the facts and circumstances described above, in

treating Longview Refining as an "unconsolidated entity" and"part" of a firm as a separate firm for pricing purposes. (The consolidation of the retail subsidiaries is examined in more detail in the next section of this petition).

The lower court ignored the power of the trial court to determine that the consolidated calculations were improper, and the abundant evidence supporting that decision, and held that consolidation must be employed. But the trial court is left without direction, in the event that the decision to test the overcharge on a "consolidated" basis is maintained. The opinion states that the refiners were not consolidated to the extent "permissible" by the trial court, and that facts regarding acquisition and operation of the various companies must be taken into account in calculating Respondents' ceiling price on a consolidated basis. The lower court does not state the extent to which consolidation is permissible, nor does it state what facts regarding acquisition and operation of the various companies must be taken into account, or how those facts will affect consolidation.

Based on the trial court's finding that the Respondents totally failed to follow the

formula, as the regulations require, all charges in excess of May 15, 1973, base price are overcharges. Accordingly, Petitioners should be entitled to recover these charges in excess of the May 15, 1973 base price on all sales to Petitioners through the period ending February 27, 1974 (being the period covered by the Petitioners' proof). The trial court declined to award this amount, but, instead, based its award on calculations made by Mr. Sanders which applied the formula to Longview Refining's operations.

It is obvious that the overcharge is willful. Respondents did not attempt to consistently follow and apply the formula, with which they were thoroughly familiar. Instead they vacillated for the sole purpose of avoiding the effect of their exorbitant overcharges, and set prices which were not determined by the formula on any basis, consolidated or unconsolidated. Any request for refund on the part of the Petitioners would obviously have been ignored by Respondents. This is apparent from the Respondents' efforts to manipulate the formula so as to avoid repayment of the overcharges, and their persistence in the

position that nothing is due the Petitioners. Accordingly, the trial court was correct in holding that the violation was willful, and that application for refund was not necessary.

(c) The lower court was in error in holding that "reseller" has two different definitions, one of which is be ignored, while the other requires consolidation of retail subsidiaries in determining a refiner's price.

The pivotal consideration in Respondents' asserted basis for including the retail subsidiaries in the consolidation was their failure to meet the definition of "reseller" in subpart F of Sec. 212.91, a position which the lower court adopted.

"Refiner" is defined in Section 212.31 as "a firm (other than a reseller or retailer) or that part of such firm which refines covered products of blends and substantially changes covered products or refines liquid hydrocarbons from oil and gas field gases, or recovers liquified petroleum gases incident to petroleum refining and sells those products to resellers, retailers, reseller-retailers, or ultimate consumers. "Refiner" includes any owner of covered products which contracts to have those covered

products refined and then sells the refined covered products to resellers, retailers, reseller-retailers, or ultimate consumers."

The definition of "firm" contained in Sec. 212.31 is as follows:

> "'Firm' means any association, company, corporation, estate, individual, joint venture, partnership, or sole proprietorship or any other entity, however organized, including charitable, educational, or other eleemosynary institutions, and the federal government, including corporations, departments, federal agencies, and other instrumentalities, and state and local governments. The F.E.O. may, in regulations and forms issued in this part, treat as a firm: (1) a parent and a consolidated and unconsolidated entities (if any) which it directly or indirectly controls, (2) parent and its consolidated entities, (3) an unconsolidated entity or (4) any part of a firm."

It is therefore clear that any "part" of a firm may be treated separately for pricing purposes, and this includes separately incorporated subsidiaries wholly-owned by a holding company. It is equally clear that it is the intent of the regulations, as evidenced by the definition of

"refiner" as a firm other than a reseller or retailer, to consider refiners separately for pricing purposes. Subpart F of the regulations sets forth the pricing rules regarding resellers and retailers, and the separate treatment accorded them leads to a preliminary conclusion that the consolidation of the retail operations attempted by Respondents is not proper. Section 212.91, Subpart F, on which both the lower court and Respondents relied for the consolidation of the retailers provides:

> "This subpart applies to each sale of a covered product (other than the first sale of crude petroleum) by resellers, reseller-retailers, and to each sale of crude petroleum (other than the first sale) by a refiner. For purposes of this subpart 'reseller' includes any entity of a refiner which is engaged in the business of purchasing and reselling covered products, provided that the entity does not purchase more than five percent of such covered products from the refiner including any entities which it directly or indirectly controls, and provided further that the entity has historically and consistently exercised the exclusive price authority with respect to sales by the entity."

"Reseller" is also defined in Sec. 212.31 as "a firm (other than a refiner or retailer) or that part of such a firm which carries on the trade or business of purchasing covered products, and reselling them without substantially changing their form to purchasers other than ultimate consumers." The same section defines "reseller-retailer" as "a firm (other than a refiner) or that part of such a firm which carries on the functions of both a reseller and retailer."

"Retailer" is defined in Sec. 212.31 as "a firm (other than a refiner or reseller) or that part of such a firm which carries on the trade of business of purchasing covered products and reselling them to ultimate consumers without substantially changing their form."

It is clear from these definitions that "reseller" refers to those performing middleman functions (e.g., jobbers), i.e., those who buy from refiners and resell to purchasers other than ultimate consumers. Sec. 212.91 allows the F.E.O. to treat certain subsidiaries performing as jobbers as part of the parent refiners. This has no application to the present case.

Subpart F lays down pricing rules applicable to resellers, reseller-retailers and retailers which are entirely separate from those applicable to refiners. Sec. 212.91 says that for purposes of pricing under Subpart F, the term "reseller" includes any entity of a refiner which (1) purchases less than five percent of its covered products from the refiner or its controlled entities, and (2) historically and consistently exercises exclusive price authority with respect to its sales. If the reseller does not meet these two requirements, presumably (for it is not expressly stated) the reseller entity will be considered part of the refiner for pricing purposes. But this provides no authority whatever for determining the prices of a retailer under the rules in Subpart E, applicable to refiners, rather than under Subpart F, applicable to retailers. The case at hand deals only with retailers, not resellers. Had those who drafted the regulations intended the exclusionary provision to apply to retailers, or even reseller-retailers, they certainly would have said so. There is no reason, logic, or authority for holding that the term "reseller" in Sec. 212.91 has no relation to the definition of reseller

contained in Sec. 212.31. (which contains the general definitions applicable to the regulations). Nor is there any basis for broadening the term reseller, as used in the exclusion in Sec. 212.91 to include retailers, where "retailer" has an entirely different definition.

Crystal Petroleum Company, Tulsa Oil Corporation, and Stone's Independent Oil Distributors, Incorporated, the non-refiner companies with which Respondents consolidated all refining operations, are all retailers. (R. 549 and Crystal Oil Company Annual Report, 1973). The record fails to reveal any basis for treating them as "resellers," i.e., firms which purchase covered products and resell them without substantially changing their form to purchasers other than ultimate consumers. But the record (e.g., Mr. Burns' reference to them as "retailers") and public disclosure, i.e., the annual reports by Crystal Oil Company, show that the named subsidiaries are retailers. Witness the following excerpts from the 1973 Annual Report relating to retail operations:

"CRYSTAL PETROLEUM COMPANY

"During the past year Crystal Petroleum Company moved to develop its profit potential. Improvements were made in financial management with tight control on receivables and payables. Changes in the method of transmitting funds from stations to our central banks have greatly expedited the flow of cash available for operations. A detailed study was completed on unprofitable stations and a systematic, organized program was instituted to shut down and lease the most unprofitable ones. Some of these stations may be reopened by the Company in the future. The operating personnel has been reduced and efficiency improved. The retail market improved steadily through the last six months of the year, however, costs for product increased in this area at a faster rate than could be absorbed at the retail level. The product supply situation has improved and Crystal Petroleum is not having the difficulties experienced by many independents in keeping the stations supplied with gasoline. With the shutdown of these unprofitable stations, stable market conditions, and improved management, Crystal Petroleum should improve its profit position in 1974.

"JOE E. HUTCHISON DISTRIBUTING COMPANY

"The management of Joe E. Hutchison Distributing Company was consolidated with Crystal Petroleum Company on September 1, 1973. This consolidation places all retail operation in the southeastern United States (excluding Stone Oil) under one retail management. These changes enabled the personnel at Hi-Octane Terminal to give more attention to the acquisition and blending of product, not only for our retail outlets, but also for our wholesale customers.

"TULSA OIL CORPORATION

"Because of the energy crisis, it was decided that no new locations were required by Tulsa during 1973. Tulsa concentrated on increasing productivity per existing unit; this 1973 increase was 11.3 percent per unit over 1972. In 1973 net profit margins at retail improved over 1972 and per gallon unit operating costs were reduced by 21%. Tulsa has been in a strong retail gasoline marketing area whereby they could sell at the maximum ceiling prices allowed most of the year. Under its excellent management Tulsa continues to contribute substantially to Company earnings.

"STONE'S INDEPENDENT OIL DISTRIBUTORS, INC.

"Stone's Companies had a good operational year in 1973 with earnings

in its normal range. Even with occasionally restricted volumes of product, Stone was able to operate on a profitable basis approximately equal to previous years. Our operations were temporarily taxed during the month of August 1973 when our main gasoline supplier discontinued deliveries. During the interval that exchange negotiations were being settled, our ability to supply even minimum amounts to our customers was, at times, in question. We marketed a low volume for that month of less than 2,000,000 gallons of all products, which was down from a volume of slightly over with a great deal of aid from exchange agreements and from Hi-Octane Terminal Company, another of our subsidiaries, we were able to build back to an average monthly volume in excess of 3,000,000 gallons. With the impetus of the energy crisis in full swing, our retail market once again reached profitable levels commensurate with effort and investment involved. Those stations which failed to react in this market were temporarily closed on the basis that products could be more profitably placed at other locations at this time. Our wholesale operation was stifled in the latter part of the year by a supply imbalance at certain terminal locations. This, coupled with resulting terminal shortages and scheduled drawing down of available products, did not allow us to operate our transports as efficiently as in the past. While the cost was

recaptured in most cases, this loss in efficiency undoubtedly took its toll in profit which we would have ordinarily realized.

"With the mandatory controls for petroleum products, rise in cost, federal regulations of pricing, and shortages in the marketplace, the projection of results is difficult; however, we are optimistic that Stone Companies will contribute to the earnings of the Company."

Accordingly, the exclusion in Section 212.91, is not a definition at all, but simply a rule to determine whether reseller operations controlled by refiners will be priced under Subpart E "Refiners," or Subpart F, "Resellers and Retailers," and has no application here. It is clear that the retail distribution arms of Crystal Oil Company qualify as "retailers" and their pricing is governed by Subpart F. It would not even matter if retail distribution subsidiaries qualified as "resellers-retailers" for the evidence purpose of the exclusion in 212.91 was to determine whether the middleman function should properly be placed with the refiner or the retailer for pricing purposes.

It is thus apparent that the Respondents are not entitled to consolidate retailers with refiners for pricing purposes.

The lower court held that the "definition" contained in 10 C.F.R. Sec. 212.91 is solely for the purposes of Subpart F, Resellers and Retailers, yet relied upon it in defining "refiner" under Subpart E, to the exclusion of the general definition by which the Act is supposed to be interpreted (in Sec. 212.31, Subpart B).

In doing so, the court relied upon certain FEA determinations which do not support the result reached. Esso Standard Oil S.A. Ltd., Exxon Corporation, New York, New York (Case No. FEA 20,300, Energy Management 1974 Transfer Binder), held that Esso Standard S.A. Ltd. (Essosa) and Exxon Corporation (Exxon) should be consolidated for price determination purposes. However, this was done pursuant to "price regulations in Puerto Rico," 39 F.R. 17764, May 20, 1974, which have no application to the present case. Further, there is no discussion in the opinion regarding the proper definition of reseller, and no indication that Essosa would not qualify as a reseller under the

definitions contained in Sec. 212.31 and the exclusionary provision in Sec. 212.91.

The FEA Decision in Esso Standard Oil S.A. Ltd., Coral Gables, Florida (Case No. FEE-1025, Filed 7-30-74, decided 12-20-74) Paragraph 20,748, page 20,963, Energy Management, 1974, Transfer Binder, concluded that Essosa of the Virgin Islands should be consolidated with Exxon for pricing purposes but, here again, there is no indication that Essosa did not qualify as a reseller under the definitions of Sec. 212.31. In fact, there is no discussion of the point. The fact that Essosa may have been referred to as a "marketer" in the Virgin Islands is of no consequence, for a reseller is exactly that, i.e., a "marketer." But a reseller is not a retailer, and there is no indication that Essosa is a retailer as opposed to being a reseller or a reseller-retailer.

The case of Esso Eastern Incorporated Houston, Texas, Case No. FEE-0915, filed 6-14-74, decided 12-23-74, held that Esso Eastern's Guam branch did not meet the criteria set out in Sec. 212.91 and therefore could not be considered a reseller for the purpose of mandatory petroleum price regulations. There is

no indication that Esso Eastern did not meet the definition of reseller contained in 212.31, and certainly there is no indication that it qualified as a retailer. Therefore, the FEA opinion does not furnish support for the lower court's conclusion.

The case of Getty Oil Company (Eastern Operation), Inc., Skelly Oil Company, New York, New York (Case No. FEE-1101), Paragraph 83,041, page 83,106, Energy Management, 1975 Decisions and Orders, is subject to the same observations. In fact, it clearly appears that both Getty and Skelly met the definition of refiners, yet because of their historical independent operation, the FEA granted an exception and did not require their consolidation. The same considerations apply in the present case, and militate against consolidation. Even those companiesqualifying as refiners have historically and traditionally been operated as separate, independent entities. In fact, Crystal Oil Company only acquired and/or commenced operation of several of them during or after the period of overcharge, so Crystal serves simply as a holding company.

The trial court was faced with contrary positions, i.e., the Petitioners contended that Longview Refining's overcharge should be determined on the basis of separate calculations applicable to Longview Refining, and the Respondents contended that Longview should be consolidated with various other entities whose only relation to Longview, except for isolated intercompany transfers, was the fact of common ownership (which post-dated the origination of the pricing regulations). The Petitioners had notice of the attempt to consolidate the calculations only a short time before trial, and had no reasonable opportunity to test the attempted consolidation. The trial court quite properly and with adequate justification chose to measure the overcharge on an unconsolidated basis. This determination should have been upheld. It is admitted that the Respondent Longview Refining Company made a substantial overcharge, when considered on an unconsolidated basis (R. 562):

> "Q All right, let me rephrase the question then. If your theory in this case that there should be a consolidated approach to the application of the formula is not accepted, and it is

determined that you've got to figure it on an individual basis, the fact is, sir, that there is a very substantial overcharge under the formula. Is that not correct, sir?

A That's correct." (Testimony of Mr. Burns).

The overcharge was also publicly admitted in a letter by Respondents' attorneys to the F.E.O. which appears in the Record. Mr. Burns testified that he made calculations on which the letter was based, though he said such were based on "incorrect assumptions," the primary one being that the calculations should not be consolidated.

In reasonable probability (though it is not known for certain) consolidation of only the refining operations will not diminish the overcharge. Only by including the retail companies was the effect of the disregard of the pricing regulations alleviated. It is submitted that the regulations do not permit this sort of gerrymandered result. The trial court's determination that consolidation is not proper should be upheld.

(d) The trial court made a proper determination of "classes" and "base price" for purposes of application of the pricing formula.

When Mr. Sanders, Petitioners' C.P.A., first visited Longview Refining Company, he was furnished a sheet purporting to show transactions on May 15, 1973, supporting the calculation of base price as of May 15, 1973, supporting the calculation of base price as of May 15, 1973 (being an average price of .1525 cents per gallon for regular gasoline and .1725 cents per gallon for premium gasoline). (R. 18) Mr. Sanders subsequently found that Thriftyman, Incorporated, one of the Petitioners, had a transaction on May 15, 1973, which was not listed on the sheet furnished by Longview Refining Company. When he called for additional information, the request was handled through Respondents' lawyers. (R. 19) The response to Mr. Sanders' request for information relating to calculation of base price is contained in a letter dated February 8, 1974, appearing at page 5, et. seq. of P. Ex. 4. The explanation given for the apparent discrepancy noted by Mr. Sanders is as follows:

"1. List (Exhibit A) of all transactions for the sale of gasoline which occurred on May 15, 1973, at the refinery of Longview Refining Company (Longview). You will note that this list is in two parts. Part A includes all gasoline sales to customers of the class in which the Plaintiffs in the captioned proceeding belong. Part B includes all gasoline sales to other customers. On May 15, 1973, the customers listed in Part B constituted a distinct class separate from the class of customers in Part A as a result of the distinction in the terms of delivery to customers in Part B as opposed to customers in Part A. Customers in Part B had agreed from time to time to pick up gasoline when requested by Longview; such requests would be made when necessary as the result of inadequate refinery storage capacity. Customers in Part A had made no similar commitment to Longview. Shortly after May 15, 1973, lack of inventory storage capacity ceased to be a problem, and the distinctive arrangements with the customers listed in Part B were terminated. Thereafter such customers have been members of the class including the customers listed in Part A--that is, Longview has since June had only one class of gasoline purchasers."

The companies listed as being in the "distinctive" class were Allied, M & A, Thriftyman, and Sun Oil.[7] The evidence is contrary to the assertions in the letter. When Mr. French Peterson, who was president of Longview Refining on May 15, 1973, was questioned about these statements, the following testimony was given.

"Q Mr. Peterson, you did not have any special deal with Thriftyman that Thriftyman would pick up gasoline when requested to do so by you or Longview Refining Company, did you, sir?

A No, Thriftyman, as I said, was made (sic), because Mr. Blackman approached me and said he would bring a volume in if I could furnish the volume and guarantee to furnish it to him for a period, and we talked about it and determined to negotiate a six-months period for approximately 400,000 a month. It would vary.

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[7] In response to a question as to whether Respondents calculated a different "class" (Base price) for M & A, or Foremost, or Allied or any combination of these companies, Mr. Burns said that no sales were made "to that class of purchaser" after August, 1972, or after "the inception of the formula". (R. 569).

Q As I understand it, sir, you did not have a deal either with Sun or Allied or Humble or the Alkek Companies, Foremost and M & A, that they would just come and pick up gasoline whenever Longview Refining Company wanted them to. That was not the basis of your---?

A Not with Sun or Fina or Exxon.

Q Was it your deal with Foremost and M & A that they would just come and pick it up when you wanted them to?

A Well, we tried to keep it on a consistent volume, but our history was such that if we needed to move some, they would come in and pull more, and if we needed to move less, they could get the product elsewhere, because they were flexible on their supply.

Q All right, sir. If somebody has said in connection with this case then that as to Allied, M & A, Thriftyman, and Sun Oil that these customers had agreed from time to time to pick up gasoline when requested by Longview, that would not be true with respect to anyone except possible M & A. Is that correct, out of those four?

A Primarily M & A.[8] They never -- they were cut off sometimes for short periods, as I explained, or sometimes they would pull heavy. They were sort of a balance wheel to the refinery."

This testimony was so contrary to the asserted basis for the different classifications of customers that one of the attorneys for the Respondents, Mr. Thomas W. Houghton, was forced to the stand to admit authorship of the letter of February 8th (which was over Mr. Paine's signature) and attempt an explanation as to its lack of accuracy. (R. 461, et. seq.)

Mr. Clint Blackman, Jr., President of Thriftyman, testified that the price obtained by Thriftyman, Inc. was never set or determined on the basis that Thriftyman would pick up fuel from Longview Refining Company whenever Longview Refining Company requested. (R. 579). There is no apparent basis or justification for the difference in treatment of the customers making purchases on May 15th, once the

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[8] See Footnote 7. Since M & A made no purchases on May 15, 1973 its price was not part of the base price calculation, and any justification for putting it in a separate class is immaterial.

explaination of the attorney's letter of February 8th, 1974, is negated. It is clear from reference to the record (R. 431-36, 457-58) and to Mr. Blackman's testimony that there was no "customary price differential" based on "different characteristics" of customer groupings. There is no evidence whatever of any special contractual relationship between Longview and any of the companies which made purchases on May 15, 1973, and which were excluded from Respondents' base price calculations. In the final analysis, the only attempted justification of different "classing" related to Thriftyman (M & A made no purchases on May 15, 1973). But evidence directly contradicting the asserted justification came from both Mr. Peterson and Mr. Blackman, which demonstrates that all customers concerned in this inquiry possessed the same essential characteristics. Therefore, the proper base price is that which averages all transactions (including the transaction with Thriftyman and others listed on Page 7 of P.Ex. 4) as of May 15, 1973, and is the base price used in Mr. Sanders' calculations. The trial court so found. (Findings of Fact, 25-28, page 9, App. D).

The Respondents' position with respect to base price for formula pricing purposes is curiously inconsistent. They contended that Thriftyman's transactions on May 15, 1973 should not be included for purposes of determining the base price applicable to the other Petitioners, but, did not calculate charges separately for Thriftyman using a different base price. This is contrary to the regulations, which state that in computing the base price, a firm may not exclude any temporary special sale, deal, or allowance in effect on May 15, 1973. Sec. 212.82 (f) (1). Had Respondents separately calculated Thriftyman's base price, the resulting overcharge to Thriftyman would have been much greater than the overcharge to other Petitioners. But, instead, Respondents simply excluded Thriftyman for base price calculation, then included it, along with all other Petitioners, for pricing purposes.

The lower court said that the trial court should have made a specific determination of the dollar amount of May 15, 1973, weighted average price for each product involved as well as actual base price figures for sales to Petitioners "class" of purchasers and should have

made a more specific finding as to whether Petrofina and others claimed to be a class of purchasers separate from Petitioners were included in Petitioners' class. It is clear that the trial court made these determinations, and that the lower court is confused. The trial court specifically found the base price used by petitioners to be the weighted average price of all transactions on May 15, 1973, and to be the proper base price. It also found that there was only one class involved in the pricing to petitioners, which consisted of those companies listed on page 7 of P. Ex.4, which contains the base price calculation. There was more than adequate evidence on which to base the trial court's conclusions, and it is not clear if the lower court even disagrees with those findings. If it does, the opinion gives no guidance whatever with regard to the question of why the class determination was improper. Certainly, there in no indication that the evidence, which was fully developed on the point, required putting Thriftyman or any other purchaser which made a purchase on May 15, 1973, in a separate class and accorded a different base price. The Respondents similarily disregarded all lower

prices charged in transactions on May 15, (including Thriftyman's) in arriving at the base price for Petitioners. The lower court does not indicate any support for this manipulation, and all that can be safely assumed from the opinion is that a separate finding as to classes and base prices should be made with specific reference to petitioners and those which Respondents contend should be in separate classes. But this does not require re-trial, and the confusion in which the lower court has left the issue has created the risk of further appellate revision of any action that the trial court might take.

(e) The lower court is incorrect in its holding that petitioners failed to take into account the refiners incentive factor and erred in calculating the overcharges by using the current month as the month of measurement.

The amount of the overcharge is as set forth in P. Ex.6, through the month of February, 1974. It is correctly noted in the lower court's opinion that Petitioners corrected their figures twice during trial. This resulted from one basic mistake, i.e., incorrect application of a ratio factor. However,

Respondents have not pointed out any mathematical deficiency or error in the final corrected figures, nor has the lower court. But the lower court held that there are errors in the methodology of Mr. Sanders' application of the pricing formula, including: (1) failure to utilize the prior month as the month of measurement; and (2) failure to take into account the refiner's incentive factors.

(1) Month of Measurement: The pricing formula is designed to allow recovery of increased product costs by adding an appropriate increment to the base price. See Mr. Sanders' explanation, R. 71, et seq. The formula determines an increment to be added to the May 15th price which allows the refiner to recover additional costs incurred in prior months. If it is properly applied, the formula will always find the refiner just one month behind in either overcharge or undercharge. The increment is determined by dividing unrecovered costs from the past month's operation (or such as may have accumulated in prior months) by the estimated volume of sales of the product during the "current" month. Since the current month is not completed, sales in that month can not be

known, hence the "estimate." This is the only "unknown" or "estimated" component to the formula. When Mr. Sanders made his calculations, it was not necessary for him to deal with an unknown. He was furnished all the figures (by Respondents) for the period he analyzed, i.e., through February, 1974. Since Plaintiffs' calculations cover the entire period for which the refund was claimed, rather than a month-to-month calculation of what the price should have been, the "month of measurement" calculation is not a consideration. See page 3 of P. Ex. 6, which sets forth Mr. Sanders' explanation of the formula. Mr. Sanders applied the formula over the entire period, based on known figures. There was no reason to estimate, since he had all the figures applicable to the period for which he calculated the overcharge. When challenged as to this approach, Mr. Sanders stated (R. 165):

> "Well, when you go through a series - a formula is designed to be applied month to month. Now when you are calculating over a period of time in which no adjustment is purported to be made on a monthly basis, it really doesn't make any difference."

There has been no logical challenge to this observation. Mr. Burns testified that when he made calculations for Longview, on an individual basis, his figures were "very close" to those of Mr. Sanders, which further serves to verify the validity of Mr. Sanders' approach to the problem. It has not been demonstrated that this approach reaches an incorrect result. It is obvious that this observation by the lower court is of no consequence.

(2) Refiners' Incentive Factor: The refiners' incentive factor was not included in Petitioners' calculations because there was never any indication (until Respondents' calculations were furnished shortly before trial) that it should be. Respondents' letter of February 8, 1974 indicates that Petitioners were being furnished everything needed for determining the validity of Respondents' pricing, but made no mention of the incentive factor.[9] Under these

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[9] It was stated in Respondents' letter of February 8, 1974, P. Ex. 6, pages 8-9:

> "It is our belief that the information furnished herewith is sufficient to permit application of such formula. Longview does not take the position that it is entitled to charge any price in excess of base price. Therefore, the other information you have

circumstances, Respondents should logically have been estopped from asserting that the factor should be included. However, post trial examination of Respondents' sales schedules show that no refiner incentive factor is applicable during the pertinent period. The incentive factor is applicable only to middle distillates, and is designed to encourage and reward increased middle distillate production. Longview Refining Company had no increase in middle distillate yield during the pertinent period. Therefore, under the terms of Sec. 212.84, there is no refiner incentive available to them.

The lower court also made a passing reference to "increased product cost" included by Respondents in their calculations. The "additional costs" incurred by Respondents represent costs "generated" by Crystal subsidiaries through inter-company transfers.

9(cont)

> requested is not material to the lawfulness of Longview's prices." The refiners incentive factor results in a price in excess of base price.

Accordingly, it is clear that Respondents are estopped from claiming that information they did not furnish should be included in the calculations.

Butane was acquired through inter-company transfer, and then sold to the B. F. Goodrich Company at a loss. Longview Refining Company purchased polymer from B. F. Goodrich Company. The polymer was used as a blending stock. Respondents contended that they had to sell the butane to Goodrich in order to get the polymer. The cost of the polymer, i.e., the price paid by Longview Refining to B. F. Goodrich was included in Petitioners' calculations of product cost. The loss on the butane obtained in the inter-company transaction was not included. Only the direct cost of crude and blending stocks used directly in the processing of the finished product are properly includable as costs. This applies also to the purchase of gasoline and diesel. Respondents also included in their calculations an inter-company purchase of gasoline for .27587 cents per gallon and sale by Longview at .2050 cents which served no purpose except to increase Longview's costs. The same is true of a purchase of diesel for .27372 cents and sale at .2050 cents. These inter-company transfers represent nothing more than a further attempt to circumvent the law. The lower court observed that they were not

demonstrated to be improper, but the trial court was certainly justified in so concluding on the basis of the nature of the transactions, and Respondent's various manipulations of the pricing regulations.

Furthermore, the effect of these questionable transactions, even if accepted at face value, are negligible so far as the present case is concerned because of the decreased purchases by the Petitioners. The figures are as follows:

Additional cost - per consolidated report:	
January	$ 42,857.00
February	69,815.00
Total Additional Cost	$ 112,672.00
Gas and Diesel Percentage:	
January .5695 X 42,857.00 =	$ 24,407.00
February .5475 X 69,815.00 =	38,223.00
Petitioner's Percentage:	
January .1411 X 24,407.00 =	$ 3,443.00
February .0942 X 69,815.00 =	6,576.00
Total Additional Cost - Petitioners' Portion	$ 10,019.00

The costs for February would not be recouped until March. Since Petitioners' calculations only covered a period ending in February, the February costs would not be considered. Thus these so-called additional costs would have only a negligible effect on recovery in any event. If Petitioners are wrong and the transfers are required to be considered, Petitioners' recovery can be reduced by the appropriate amount ($3,443.00), but there is certainly no need for new trial for this purpose.

4. There is no necessity and no legal requirement for joinder of the administrative agency, which would serve only to delay disposition of the case.

The lower court has instructed the trial court, on remand, to order the FEA to be joined as a party to the litigation. This is done even though it has not been requested or suggested by either party. The court also instructs the trial court that it may call and examine a witness from Petrofina to determine the

truth regarding the existence of the alleged agreement of June 4, 1973 between Longview and Petrofina. The indication is that the trial court could not make this determination from the Respondents' testimony, adduced through French Peterson, and Reba Morrow which testimony, contrary to supporting such an agreement, negates its existence. The trial court is also invited to secure the testimony of Mr. Leeseman (who properly should have been Respondents' witness but was not) regarding the Respondents' understanding and application of the pricing formula. Of course, it is undisputed that no qualified effort was made to follow the formula while Mr. Leeseman was in charge and it is difficult to see how Mr. Leeseman's testimony could add or detract from this proposition, since Mr. Leeseman's method of calculation, illustrated in his own handwriting, is in evidence. These directions by the court to the trial court are unwarranted, without authority, and impose an unnecessary burden upon retrial of this case.

The requirement that the FEA be joined is particularly dilatory. It is settled that in redressing grievances under the Acts and the regulations, Petitioners may apply directly to the

district court and need not "exhaust administrative remedies", a proposition that is not even in question in this case.[10] This case has been fully developed, and, if remanded, can be retried expeditiously without bureaucratic assistance or intervention, which will serve only to delay. This delay should, and can easily be avoided.

CONCLUSION

On different occasions in the opinion, the lower court speaks of "fairness" for the Respondents, but nothing is said about fairness for the Petitioners. The trial court heard the evidence and observed the demeanor of the witnesses, and their attorneys (who were found to have directly misstated relevant facts to the Petitioners, which caused Mr. Houghton to take the witness stand to shield Mr. Paine from responsibility for the misstatements). On the basis of all the evidence the trial court reached a

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10 Respondents raised the point in the trial courts, were overruled, and abandoned it on appeal.

conclusion that there had been a willful overcharge. The Petitioners upon whom the overcharge was inflicted were all seriously injured financially, and certain of them were forced out of business as a result. It is strongly intimated by the lower court that the Petitioners should have filed a presuit demand for refund of the overcharge, setting forth specifically, with respect to each Petitioner, the exact amount of the overcharge claimed. The fact that this presented an impossible burden to the Petitioners, who, without litigation, did not have access to the necessary facts and figures, is ignored by the lower court, yet it embraces the proposition that the Respondents, who are armed with the facts and figures, may escape the consequence of a willful overcharge by claiming that they did not know their prices would results in an overcharge.

The holding of the lower court that the failure to follow the pricing formula does not constitute a legal wrong, and that it is only the intentional charging of a price known to be in excess of the applicable ceiling price allowable which constitutes a willful overcharge invites and authorizes intentional disregard of the

regulations. When this holding is considered against the following language in the opinion it is apparent that the opinion gives unwarranted protection to Respondents against the effect of deliberate actions resulting in overcharges:

> "It is difficult, even for experts, to understand these complex regulations, as evidenced by the frequent correction, modification, change and clarifying rulings...."

With this as an umbrella Respondents will be able, with virtual impunity, to state that they did not understand the regulations and did not know their prices exceeded the applicable ceiling price. The incongruity of this holding is illustrated by the fact that the opinion also states that Petitioners, who do not have the facts and figures (and rarely possesses the expertise) of the Respondents must, before suit is filed, tell the Respondents exactly how much the Respondents have overcharged.

The record in this case clearly shows that Respondents have thus far accomplished what the regulations are designed to prohibit. They have done so by deliberately ignoring the regulations in charging excessive prices to the

Petitioners, and then manipulating the regulations to avoid the consequences of the overcharges. By use of the illegal and erroneous pricing scheme Respondents reduced the percentage of gas and diesel sold to Petitioners from 30.71% of production in May, 1973, to 9.42% in February, 1974, with fuel being diverted to Crystal retail subsidiaries. As a result, certain of the Petitioners were forced from business, and all suffered considerable financial loss.

The holdings in the lower court's opinion obviously transcend the present case. The opinion will place serious and perhaps insurmountable obstructions in the path of proof of legitimate overcharge cases. The Petitioners do not believe that these obstructions are contemplated by the Acts or the regulations. If not, the intent of Congress and the rulemakers stands to be frustrated. Before this is allowed, it is respectfully submitted that this application for writ of certiorari should be granted.

Respectfully submitted,

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JACK N. PRICE

ATTORNEYS FOR PETITIONERS.

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing document has been forwarded to opposing counsel of record by U. S. Mail on this the 12 day of May, 1977.

Jack N Price
JACK N. PRICE

APPENDIX

APPENDIX

APPENDIX A (Opinion of the Temporary Emergency Court of Appeals)

APPENDIX B (Petitioners' Petition for Rehearing Denied)

APPENDIX C (Judgment of the United States District Court for the Eastern District of Texas, Tyler Division)

APPENDIX D (Findings of Fact and Conclusions of Law of the United States District Court for the Eastern District of Texas, Tyler Division)

Temporary Emergency Court of Appeals of the United States

No. 5-17

LONGVIEW REFINING COMPANY AND
CRYSTAL OIL COMPANY, DEFENDANTS-APPELLANTS,

v.

W. R. (BILL) SHORE, d/b/a
SHORE OIL PRODUCTS, ET AL., PLAINTIFFS-APPELLEES,

INDEPENDENT TERMINAL OPERATORS ASSOCIATION,
AMICUS CURIAE.

Appeal from the United States District Court
for the Eastern District of Texas

(No. TY-73-CA-268)

(Argued Nov. 22, 1976 Submitted Feb. 15, 1977)

DONALD B. CRAVEN, Miller & Chevalier, Washington, D.C., with whom Louis Paine and Thomas W. Houghton, Butler, Binion, Rice, Cook & Knapp, Houston, Texas, and Thomas W. Hathaway, Hathaway & Jackson, Tyler, Texas, were on the brief for the Appellants.

JACK N. PRICE, Price & Williams, Austin, Texas, on the brief for the Appellees.

WILLIAM H. BODE and WILLIAM C. LANE, JR., Batzell, Nunn & Bode, Washington, D.C., were on the brief for the Amicus Curiae.

Before INGRAHAM, VAN OOSTERHOUT, and ESTES, Judges.

APPENDIX A

ESTES, Judge.

Plaintiffs-appellees, W. R. (Bill) Shore and 12 other separate parties,[1] are purchasers of gasoline and diesel fuel from one or more refineries, which products each of them resells to and through service stations for retail distribution to consumers. Defendant-appellant Longview Refining Company (Longview) operates a small refinery which has been a supplier of gasoline and/or diesel fuel for the respective plaintiffs at various periods of time. Defendant-appellant Crysal Oil Company acquired all of Longview's capital stock as of November 1, 1973.

The plaintiffs sought declaratory and injunctive relief and monetary damages for certain actions allegedly committed by defendants: (1) violations of the Economic Stabilization Act of 1970, as amended (Stabilization Act), 12 U.S.C. § 1904 note (1976 Supp.),[2] and the Emergency

[1] The plaintiffs-appellees are:

1. W. R. (Bill) Shore, d/b/a Shore Oil Products
2. J. C. Duke Oil Company
3. J. S. Hackler
4. Martin & Son, Inc.
5. Mitchell Oil Company, Inc.
6. Pete Roberts
7. T. C. Rosser
8. J. C. Bell
9. Matthews Oil Company
10. Bob Hodge
11. M. I. Dickey, Jr., d/b/a B. & M. Oil Company
12. John H. Roberts
13. Thriftyman, Inc.

[2] The Economic Stabilization Act of 1970, as amended (Stabilization Act), 12 U.S.C. § 1904 note (1976 Supp.), expired on April 30, 1974, pursuant to § 218 of that Act. The alleged violations of regulations and orders issued pursuant to the Stabilization Act purportedly occurred during the existence of the statute, so this case falls within the § 218 saving clause of the Stabilization Act. See *Carpenters 46 County Conference Board v. The Construction Industry Stabilization Committee*, 522 F.2d 637 (TECA 1975), *cert. denied*, No. 75-1021, —— U.S. ——, 96 S.Ct. 1724, 48 L.Ed.2d 194 (1976); *United States v. California*, 504 F.2d 750 (TECA 1974), *cert. denied*, 421 U.S. 1015, 95 S.Ct. 2423, 44 L.Ed.2d 684 (1975); *State Trial Attorneys Association v. Flournoy*, 522 F.2d 1406 (TECA 1975).

Petroleum Allocation Act of 1973, as amended (Allocation Act), 15 U.S.C. § 751 *et seq.* (1976 Supp.), and regulations thereunder; (2) violations of the Sherman and Clayton Acts; and (3) violations of the parties' supply contract and the termination provisions of Article 2.309(c) of the Texas Business and Commerce Code, V.T.C.A. Bus. & C. § 2.309(c) (1968).

The plaintiffs' original complaint was filed December 27, 1973.[3] On May 7, 1974, the district court ordered the plaintiffs' first cause of action to be severed and advanced on the trial docket. The trial on the severed cause of action was held December 9-11, 1974.

Findings of Fact and Conclusions of Law were filed by the district court on January 22, 1976, and judgment was rendered February 23, 1976, for the plaintiffs against the defendants for $518,053.71, with interest from the date of judgment, attorney's fees to be determined following any appeal from the judgment, and all costs of court. On March 17, 1976, the district court granted the defendants' motion for a stay of execution

[3] In the first cause of action in the original complaint [Appellants' Brief Appendix (Br. App.) pp. 6-18], the plaintiffs alleged violations of the Stabilization Act alone, since the regulations promulgated pursuant to the Emergency Petroleum Allocation Act of 1973 (Allocation Act), 15 U.S.C. § 751 *et seq.* (1976 Supp.), enacted November 27, 1973, had not been issued. Plaintiffs' Fifth Amended Complaint (Br. App. pp. 45-58) filed July 15, 1974, alleges, *inter alia*, violations of the Allocation Act regulations which became effective January 15, 1974 (39 F.R. 1924).

of the judgment pending appeal to the Temporary Emergency Court of Appeals (TECA).[4] Defendants filed a notice of appeal with this court on March 23, 1976.

Finding the judgment entered February 23, 1976, by the district court on plaintiffs-appellees' severed cause of action to be non-appealable without proper certification by the district court in accordance with Federal Rule of Civil Procedure (FRCP) 54(b), this court entered an order on June 24, 1976, dismissing the defendants-appellants' appeal. Acting upon plaintiffs' motion, the district court entered an order on August 10, 1976, dismissing the antitrust claims contained in the second and third causes of action (Sections IV and V of the Plaintiffs' Complaint) without prejudice to refiling. Based on that order's making the February 23, 1976 judgment final pursuant to the requirements of 28 U.S.C. § 1291, defendants filed a notice of appeal in this court on September 7, 1976.[5] Since the plaintiffs' motion requested dismissal of the contract claims, the antitrust claims, and the claims against Atlantic Richfield Company and since the third cause of action con-

[4] Under § 211(b)(2) of the Stabilization Act, the Temporary Emergency Court of Appeals (TECA) has exclusive appellate jurisdiction of all cases arising under the Stabilization Act. Section 5(a)(1) of the Allocation Act, which adopts § 211 of the Stabilization Act, grants the TECA exclusive appellate jurisdiction over all cases arising under the Allocation Act, under regulations promulgated pursuant to § 4(a) of that Act, or under any action taken by the President or his delegate under that Act.

[5] As we indicated in *Spinetti v. Atlantic Richfield Company*, 522 F.2d 1401, 1403 (TECA 1975), this court does not have jurisdiction over claims such as the antitrust and contractual claims made in the plaintiffs' complaint. Cf. *Associated Gen. Con., Okl. Div. v. Laborers Int. U., Loc. 612*, 489 F.2d 749, 751 (TECA 1973); *United States v. Cooper*, 482 F.2d 1393 (TECA 1973), approved in *Bray v. United States*, 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed.2d 215 (1975).

tained in Section V of the Plaintiffs' Fifth Amended Complaint expressly deals with supply contract violations, the contract claims and those against Atlantic Richfield Company were dismissed. There being no further claims or causes of action in the district court, this court has jurisdiction over this appeal.

There are two basic periods of time during which the plaintiffs paid the defendants prices which allegedly constituted overcharges under the Stabilization Act and the Allocation Act. These two periods are: (1) the entire freeze period from June 13, 1973, through August 19, 1973;[6] and (2) that portion of the pricing formula period from November 1, 1973, through February 28, 1974.[7] The defendant Longview Refining Company allegedly overcharged the plaintiffs during the first freeze

[6] On January 11, 1973, President Nixon issued Executive Order No. 11695, 38 F.R. 1473 (January 12, 1973), which instituted the largely voluntary Phase III price control program. Since sufficient stabilization of the economy was not being achieved under Phase III, the President imposed a comprehensive price freeze on sales prices of all services and commodities, except raw agricultural products, for a maximum period of 60 days. Executive Order No. 11723, June 13, 1973, 38 F.R. 15763 (June 15, 1973). The 60-day freeze period scheduled to expire on August 12, 1973, was extended to August 19, 1973. 38 F.R. 21933 (August 14, 1973). Phase IV controls commenced on July 18, 1973. Executive Order No. 11730, 38 F.R. 19345 (July 19, 1973).

[7] The pricing formula regulations issued under Phase IV of the Stabilization Act became effective August 19, 1973. 38 F.R. 22536 (August 22, 1973). The basic price rule for refiners originated at 6 CFR § 150.355, 38 F.R. 22536 (August 22, 1973), and the allocation of increased costs to the price of covered products sold by refiners was provided for in 6 CFR §§ 150.356. Numerous changes and amendments were made. (See Appendices A, B, and C to this opinion.) Subsequently, new regulations were promulgated by the Federal Energy Office (FEO) under the authority of the Allocation Act, 10 CFR §§ 212.82-83, 39 F.R. 1924 (January 15, 1974).

period, and Longview Refining Company and Crystal Oil Company allegedly overcharged the plaintiffs during the pricing formula period, November 1, 1973, through February 28, 1974.

In essence, plaintiffs' cause of action was based upon assertions: (1) that the defendant Longview Refining Company's charges to plaintiffs for gasoline and diesel fuels during the freeze period, from June 13 to August 19, 1973, were higher than the maximum allowable price under Executive Order No. 11723, June 13, 1973, 38 F.R. 15763 (June 15, 1973), as extended through August 19, 1973, at 38 F.R. 21933 (August 14, 1973), resulting in an overcharge to plaintiffs;[8] and (2) that the defendants subsequently failed to comply with the Phase IV pricing formula established by the Cost of Living Council (CLC) at 6 CFR §§ 150.355-356 and continued by the Federal Energy Office (FEO), sometimes referred to in this opinion as Federal Energy Administration (FEA), in 10 CFR § 212.82-83, resulting in additional overcharges to the plaintiffs.[9] Asserting that the overcharges were

[8] Plaintiffs contended that they did not learn about the freeze period overcharge until the discovery phase of this suit, so they sought recovery of those overcharges in addition to recovery due to overcharges resulting from the pricing formula violations. (Br. App. p. 51). Neither the quantity of the plaintiffs' purchases from Longview during the freeze period nor the dollar amount of any claimed overcharge during the freeze period is alleged in the complaint.

[9] The plaintiffs did not state the amount of any overcharge during the pricing formula period in their original or in any of their amended complaints. Plaintiffs' Exhibit 6 sets forth overcharge calculations first on the basis of monthly reports and second on the basis of more recent figures supplied by defendants prior to trial. Under the former, the net overcharge by defendants was $500,815.00, of which plaintiffs' portion would be $100,466.15. Under the latter, plaintiffs calculated a total net overcharge of $243,505.00, with their portion being $91,964.96.

[Continued]

willful and intentional on the part of the defendants, the plaintiffs sought treble damages under Section 210 of the Stabilization Act.[10]

[9] [Continued]

After cross-examination by the defendants' attorneys, the plaintiffs recalculated the figures in their exhibit and introduced Exhibit 6-A. The overcharges based on the monthly reports were alleged to be $509,395.00, the plaintiffs' share being $169,235.17. Using more recent figures, plaintiffs showed overcharges of $332,452.00, their share being $165,-864.20. The plaintiffs' final recalculation made in Exhibit 6-B following further cross-examination indicates overcharges of $509,395.00 based on the monthly reports, with plaintiffs' portion being $99,237.06. The more recent figures showed overcharges of $332,452.00, of which $99,656.98 was plaintiffs' share.

[10] Section 5(a) of the Allocation Act adopts § 210 of the Stabilization Act, which provides:

> (a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.
>
> (b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:
>
> (1) an amount not more than three times the amount of the overcharge upon which the action is based, or
>
> (2) not less than $100 or more than $1,000;
>
> except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of

The district court found that defendant Longview intentionally and willfully overcharged during the freeze period the amount of $73,027.59. Apparently, the district court accepted the calculations of plaintiffs' CPA witness, Mr. Sanders, that the total overcharge was $.0125 x 5.842207, i.e., the overcharge per gallon multiplied by the total gallonage of regular gasoline, premium gasoline, and diesel fuel purchased by plaintiffs June 13 through August 19, 1973.[11] According to Mr. Sanders, the $73,027.59 figure represents the total overcharges for all of the plaintiffs except one who did not provide his purchases for that period.[12]

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such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided*, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

[11] In the trial court, plaintiffs introduced the total of their freeze period purchases in aggregate form. (Plaintiffs' Exhibit 2). Defense counsel objected to this as not being proof of the actual purchases by each plaintiff. [Transcript (T.R.) pp. 40-41].

[12] Plaintiff J. C. Bell's purchases were not included in either the freeze period calculations (T.R. p. 40) or the pricing formula calculations (T.R. pp. 130,135). At trial, Bell testified that his purchases averaged around 5,000 gallons a month (T.R. p. 319) and that in the latter part of 1973 purchases ranged from a high of approximately 6,000 gallons to a low of 1,845 gallons (T.R. p. 323).

In addition, the district court found that the plaintiffs had proved the defendants willfully violated the Phase IV pricing formula, 6 CFR § 150.356, and the Allocation Act's pricing formula, 10 CFR § 212.83(c)(2).[13] The court accepted Mr. Sanders' calculation in Plaintiffs' Exhibit 6(b) that the overcharge through February, 1974, amounted to $99,656.98. Concluding that the overcharge must be presumed to be deliberate and not the result of bona fide error, rejecting the alternative of awarding damages not less than $100 nor more than $1,000, and exercising its power to treble the amount of the overcharge, the district court ordered that the plaintiffs recover $518,053.71 [($73,027.59 + $99,656.98) x 3] with interest. [Conclusions of Law (C.L.) 15, 16].

The method for determining the existence and amount of any overcharge during the freeze and formula periods involved is different. During the freeze period, the price of covered petroleum products was required to be maintained at the level at which the seller had made at least ten per cent of the total sales to the same class of purchaser during the *freeze base period*, June 1 to June 8, 1973. Under the Phase IV pricing formula which became effective at the end of the freeze period and continued under FEO regulations, the maximum allowable price was determined by reference to a complicated,

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[13] [Findings of Fact (F.F.) 15-24]. The plaintiffs introduced the relevant regulations (T.R. 70) as they were reproduced at ¶ 48,821 of the CCH Stabilization Program Guidelines for the Phase IV pricing rules. (See Appendix A, pages 48,832 and 48,833 of which were part of Plaintiff's Exhibit 6). As noted at ¶ 48,821, p. 48,830, this represents 10 CFR § 212.82 as amended at least through April 10, 1974, and at ¶ 48,821, p. 48,834, 10 CFR § 212.83 as amended at least through May 1, 1974. Close examination of this material and the pertinent history of the regulations contained therein reveals that the regulations introduced were not the same as those effective during the entire period in controversy.

changing formula which allocated refiners' increased costs to their covered products.[14]

Clearly, plaintiffs have the burden in this case to provide the specific data needed to prove the existence of an overcharge. Determining lawful prices during both the freeze period and the pricing formula period requires an interpretation of certain essential concepts and terms used in the regulations.[15] The pricing formula, 10 CFR § 212.83, is extremely complex and its application calls

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[14] In *Schirtzinger v. Dunlop*, 489 F.2d 1307 (TECA 1973), this court noted regarding Subpart L of the Cost of Living Council (CLC) Phase IV regulations dealing with the pricing of petroleum products:

> Subsequent to oral argument of this case on September 17, [1973] the CLC has on three separate occasions significantly amended the regulations here involved . . .

489 F.2d at 1308. Another example of the agency's changing regulations which were the subject of a pending lawsuit is *Consumers Union of U. S. v. Sawhill*, 525 F.2d 1068 (TECA *en banc* 1975). The *Schirtzinger* court examined the amendments and their effect on computation of allowable prices under the regulations. 489 F.2d at 1308-9. See Appendix B for text of changes.

For example, the formula was revised, corrected or changed practically once a month between September, 1973, and February, 1974. See Note 26.

[15] The FEA issued Ruling 1974-17 dealing with Base Price Computation, 39 F.R. 21042 (June 18, 1974), CCH Energy Management ¶ 16,027, and Ruling 1974-18 dealing with Discounted May 15, 1973 Price to a Class of Purchaser, 39 F.R. 21042 (June 18, 1974), CCH Energy Management ¶ 16,028, on June 12, 1974. Subsequently, the FEA issued Ruling 1975-2 dealing with Application of the Term "Class of Purchaser". Under FEA Petroleum Price Regulations, 40 F.R. 10655 (March 7, 1974), CCH Energy Management ¶ 16,042, stating that "those rulings did not resolve all outstanding questions and that to some extent the rulings themselves have been misconstrued." CCH Energy Management ¶ 16,042, at p. 16,073.

for expertise.[16] Thus, precise findings of fact by the district court are of paramount importance in this case.

In *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, at 419, 63 S.Ct. 1141, at 1143, 87 L.Ed. 1485, at 1487 (1943), the Supreme Court stated that "[t]he nature and degree of exactness of the findings required depends on the circumstances of the particular case." After noting facts which it would have been appropriate for the district court to consider, the Supreme Court held:

> It may be that adequate evidence as to these matters is in the present record. On that we do not pass, for it is not the function of this court to search the record and analyze the evidence in order to supply findings which the trial court failed to make. Nor do we intimate that findings must be made on all of the enumerated matters or need be made on no others; . . . We hold only that *there must be findings*, stated either in the court's opinion or separately, *which are sufficient to indicate the factual basis for the ultimate conclusion*. (emphasis added)

319 U.S. at 421-422, 63 S.Ct. at 1145, 87 L.Ed. at 1489. In the case before this court, the district court's findings as to the facts relevant to the proof of any overcharges alleged in the plaintiffs' complaint are not sufficiently specific to substantiate concluding there was an overcharge by the defendants in any sum certain as to any individual plaintiff.

Willful Overcharge

In considering the overcharges the district court found that plaintiffs paid during the freeze and formula periods,

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[16] See T.R. p. 70-91 and 492-520. The defendant's CPA-witness testified that the cost recovery formula is very complex, that many parts are subject to multiple constructions, and that even accountants may disagree about proper application. (T.R. p. 523).

the crucial question which must be examined initially is whether the alleged overcharge was willful (in either or both periods) within the meaning of section 208(a) of the Stabilization Act. Section 210(b)(2) precludes bringing an action for an overcharge which "is not willful within the meaning of section 208(a)" unless "a bona fide claim for refund has been presented." [17] It is undisputed that the plaintiffs did not present defendants with a claim before instituting this action; plaintiffs assert that the overcharge was willful.

Requiring presentation of a bona fide claim for refund of an overcharge is part of the congressional provision of an opportunity and an incentive for non-judicial settlement. If the person refuses to refund the overcharge within 90 days of the presentation of a claim, the injured party may bring suit pursuant to § 210 of the Stabilization Act. Under § 210(b) of that act, a defendant can be subjected to serious penalties [18] in addition to repayment of the overcharge unless the defendant "establishes that the overcharge was not intentional

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[17] Section 210(b)(2) of the Stabilization Act is adopted by § 5(a) of the Allocation Act and provides, *inter alia*:

> That where the overcharge is not *willful within the meaning of section 208(a)* of this title, *no action for an overcharge may be brought* by or on behalf of any person *unless such person has first presented to the seller or renter a bona fide claim for refund* of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim. (emphasis added).

See Note 10, above, for more complete text of Stabilization Act § 210. The Act does not excuse failure to present a claim for refund simply upon a conclusion that it would have been futile.

[18] See Note 10, above, for the text of § 210(b) of the Stabilization Act providing penalties which a court may award in an action brought under § 210(a) of that Act.

and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error . . ." Stabilization Act § 210(b)(2), 12 U.S.C. § 1904 note (1976 Supp.).

The district court found as to each time period involved that it was unnecessary for plaintiffs to present a claim for refund, since defendants' overcharge was willful. The finding of willfulness was based upon an erroneous conclusion that as a matter of law the "civil meaning of willfulness" controls this case. (C.L. 14). In the absence of prior presentation of a claim for refund, the overcharge must be found to be willful in the criminal sense, even though the action is itself civil. As this court stated in *Manning v. University of Notre Dame du Lac*, 484 F.2d 501, 503 (TECA 1974):

> The Act clearly reveals in this context that the term "willful overcharge" must be construed in the criminal sense.

Pure statutory construction clearly supports the *Manning* holding. Also, the district court concluded that section 210 of the Stabilization Act "is essentially civil in nature." (C.L. 14) This conclusion ignores the express language of section 210 requiring the overcharge to be "willful within the meaning of section 208(a)." From the face of section 208, there can be no doubt that section 208(a) is essentially criminal in nature.[19]

Since the section 208(a) criminal meaning of willful governs in section 210 of the Stabilization Act, two dis-

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[19] "§ 208. Sanctions; criminal fine and civil penalty

(a) Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000 for each violation.

(b) Whoever violates any order or regulation under this title shall be subject to a civil penalty of not more than $2,500 for each violation."

trict court decisions in criminal actions brought under the Act are pertinent. Facing the issue of whether the predecessor of section 208(a) was civil or penal in nature, the district court in *United States v. Futura*, 339 F.Supp. 162, 165 (N.D. Fla. 1972), held the section was penal and that

> Violation of the [Stabilization] Act is predicated upon a showing or finding of *scienter*, i.e. willful disobedience of the Act or regulations by the offender.

The *Futura* court looked to the legislative history of section 208 and concluded that it revealed "that Congress did in fact intend that a crime be created and did intend to provide for criminal punishment for violation thereof." *United States v. Futura*, at 165-166. Agreeing with the *Futura* court that "§ 208(a) criminal penalties were written with an eye to scienter," the district court in *United States v. Gulf Oil Corp.*, 408 F. Supp. 450, 463 (W.D. Pa. 1975), decided that

> The Congress in enacting § 208(a) of the Economic Stabilization Act, intended that those refiners who, with bad motive or criminal intent, refused to comply with the regulations passed pursuant to the Act, would thereby be subjected to criminal fines.

Further examination of legislative history substantiates this court's conclusion that the criminal rather than the civil meaning of willful was intended to apply in this case. While discussing the provisions of section 210 and the requirement of presentation of a bona fide claim for refund prior to commencing an action for overcharge, the Conference Committee stated in the Joint Explanatory Statement: "The House Bill also provided that the term 'willful' shall have the same meaning as in the case of criminal willfulness. . . . The Conference accepted the House provisions." Conference Report No. 92-753, 2 U.S. Code Cong. & Adm. News, 92d Congress, 1st Sess., p. 2307, 2310 (1973).

Cases interpreting the word "willfully" for purposes of the tax law require proof under the criminal meaning. Deciding that "willfully" had the same meaning in the context of a misdemeanor tax statute that it had in the context of a felony tax statute, the Supreme Court stated in *United States v. Bishop*, 412 U.S. 346, 360-361, 93A S.Ct. 2008, 2017, 36 L.Ed.2d 941 (1973):

> The Court, in fact, has recognized that the word "willfully" in these statutes generally connotes a voluntary, *intentional violation* of a known legal duty. It has formulated the requirement of willfulness as "bad faith or evil intent," [*United States v.*] *Murdock*, 290 U.S. [389] at 398, 54 S.Ct. [223] at 226, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," *Spies* [*v. United States*], 317 U.S. [492] at 498, 63 S.Ct. [364] at 368, or knowledge that the taxpayer "should have reported more income than he did." *Sansone* [*v. United States*], 380 U.S. [343] at 353, 85 S.Ct. [1004] at 1011. . . . In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law. . . . The Court's consistent interpretation of the word "willfully" to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers. (emphasis added)

Upholding a jury instruction concerning willful filing of false income tax returns, the Supreme Court recently held that willfulness means "a voluntary, *intentional violation* of a known legal duty." (emphasis added) *United States v. Pomponio*, —— U.S. ——, 97 S.Ct. 22, 24, 50 L.Ed.2d 12, 16 (1976). *Pomponio* approved cases instructing the jury to the effect that intentional violation of a known legal duty must be embodied in the definition of willfulness and that negligence neither de-

fines nor constitutes willfulness. See *United States v. Pohlman*, 522 F.2d 974, 976 (8 Cir. 1975) (en banc), *cert. denied*, 423 U.S. 1049 (1976); *United States v. McCorkle*, 511 F.2d 482, 484 (7 Cir. 1975) (en banc), *cert. denied*, 423 U.S. 826 (1975); *United States v. Greenlee*, 517 F.2d 899, 904 (3 Cir. 1975), *cert. denied*, 423 U.S. 985 (1975); *United States v. Hawk*, 497 F.2d 365, 366-367 (9 Cir. 1974), *cert. denied*, 419 U.S. 838 (1974).

In the instant case, the district court's conclusion regarding a willful overcharge that

> . . . in the framework of this case, an overcharge is wilful where it is deliberate, or where it is the natural and probable consequence of actions of the defendants which are voluntary and intentional or which are in reckless disregard of the applicable regulations, as opposed to being the result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error (C.L. 14)

is clearly erroneous. This conclusion fails to recognize that to establish a willful overcharge there must be an intentional violation of a known legal duty, that is to say, to be willful an overcharge must have been made with the specific intention of charging a price which the defendant knew was in excess of the ceiling price allowable under the applicable pricing law and regulations. Additionally, the district court erroneously concluded that negligence can be sufficient to establish a violation. Thus, the district court decided this case on a less stringent standard of proof (civil instead of criminal willful conduct) than required by law. The findings, conclusions, and judgment were no doubt influenced by application of the wrong standard. This and other reasons discussed herein require remand to the district court for a determination of both the existence and the willfulness of

any overcharge by defendants during the periods in controversy pursuant to the criminal standard of willfulness.

In view of the obvious complexity of the regulations with respect to which the agency found it necessary to provide extensive and necessary clarification by means of several amendments and rulings and in view of the gravity of the sanctions and penalties provided by the statutes, there must be clear and convincing proof that an overcharge was willful when a claim for the amount of the overcharge was not presented to the defendant prior to bringing an action for an overcharge.[20]

Freeze Period

Under the price freeze initiated by Executive Order No. 11723, "Effective 9:00 p.m., e.s.t., June 13, 1973," 38 F.R. 15763 (June 15, 1973), the prices allowable during the freeze period were the highest prices at which at least ten per cent of a seller's products were sold to the same class of purchaser during the freeze base period from June 1 to June 8, 1973.[21] The determination of

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[20] See *United States v. Empire Gas Corporation*, —— F.2d ——, 3 CCH Energy Management ¶ 26,065 at p. 26,506, n. 2 (TECA No. 8-3, Dec. 8, 1976). Fundamental fairness requires that the regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application. *Boyce Motor Lines v. United States*, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952); *Brennan v. Occupational Safety and Health Review Commission*, 505 F.2d 869, 872 (10 Cir. 1974). One can have knowledge of a legal duty imposed by regulations only when there is adequate notice. When criminal sanctions are involved, courts will not tolerate lack of specificity, *e.g.*, *United States v. Morrison*, 536 F.2d 286 (9 Cir. 1976).

[21] In finding of Fact No. 5, the district court erroneously found that this Executive Order was effective June 15, 1973. Executive Order No. 11723, 38 F.R. 15763 (June 15, 1973), provides in pertinent part:

[Continued]

[20] [Continued]

On January 11, 1973 I issued Executive Order 11695 which provided for establishment of Phase III of the Economic Stabilization Program. On April 30, 1973 the Congress enacted, and I signed into law, amendments to the Economic Stabilization Act of 1970 which extended for one year, until April 30, 1974, the legislative authority for carrying out the Economic Stabilization Program.

. . . . Price behavior under Phase III has not been satisfactory, however. I have therefore determined to impose a comprehensive freeze for a maximum period of 60 days on the prices of all commodities and services offered for sale except the prices charged for raw agricultural products. . . .

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, particularly the Economic Stabilization Act of 1970, as amended, it is hereby ordered as follows:

Section 1. *Effective 9:00 p.m., e.s.t., June 13, 1973*, no seller may charge to any class of purchaser and no purchaser may pay a price for any commodity or service which exceeds the freeze price charged for the same or a similar commodity or service in transactions with the same class of purchaser during the freeze base period. This order shall be effective for a maximum period of 60 days from the date hereof, until 11:59 p.m., e.s.t., August 12, 1973. It is not unlawful to charge or pay a price less than the freeze price and lower prices are encouraged. (emphasis added).

* * *

Section 7. Whoever willfully violates this order or any order or regulation continued or issued under authority of this order shall be subject to a fine of not more than $5,000 for each such violation. Whoever violates this order or any order or regulation continued or issued under authority of this order shall be subject to civil penalty of not more than $2,500 for each such violation.

Section 8. For purposes of this Executive Order, the following definitions apply:

"Freeze price" means the highest price at or above which at least 10 percent of the commodities or services

defendant's allowable freeze price for sales to the plaintiffs is complicated by whether American Petrofina should be included in the plaintiffs' class of purchasers, what prices are attributable to American Petrofina's purchases, and when the purchase transactions occurred.

Longview Refining Company historically maintained different price levels for its customers, depending primarily on the customers' purchasing characteristics; however, on May 25, 1973, a price increase was adopted which resulted in all customers paying the same price.[22]

concerned were priced by the seller in transactions with the class of purchaser concerned during the freeze base period. In computing the freeze price, a seller may not exclude any temporary special sale, deal or allowance in effect during the freeze base period.

"Class of purchaser" means all those purchasers to whom a seller has charged a comparable price for comparable commodities or services during the freeze base period pursuant to customary price differentials between those purchasers and other purchasers.

"Freeze base period" means

(a) the period June 1 to June 8, 1973; or

(b) in the case of a seller who had no transactions during that period, the nearest preceding seven-day period in which he had a transaction.

"Transaction" means an arms length sale between unrelated persons and is considered to occur at the time of shipment in the case of commodities and the time of performance in the case of services. June 13, 1973.

[22] On May 25, 1973, Longview began charging all customers $.16 for regular gasoline, $.18 for premium gasoline, and $.15 for diesel fuel. A letter dated February 8, 1974, from the defendants' counsel to the accountant testifying for the plaintiff states that the distinctive arrangements which had previously warranted a price differential ended shortly after May 15, 1973. [T.R. p. 51-57, Exhibits (Ex.) pp. 88-89 and 118-119, F.F. 8 at Br. App. p. 62]. The February letter states that "since June [Longview has] had only one class of gasoline purchasers." (P. Ex. 6; Ex. p. 118).

This price continued for the plaintiffs until June 7, 1973, when Longview raised its prices by $.0125. American Petrofina (Petrofina) was billed the lower prices through June 16, 1973, when Longview issued Petrofina a debit memorandum, the effect of which was to increase prices Petrofina paid to defendants for gasoline and diesel fuel as of June 4, 1973.

Testimony by defendants' witnesses indicates that the failure to invoice Petrofina the higher price was due to clerical error and that all of defendants' customers were to be charged the higher prices at least as of June 7, 1973. Mr. Peterson, who was president of Longview Refining Company at this time, testified that Petrofina's price increase was to have been effective June 4, 1973, and that he had so agreed with Petrofina.[23]

The district court found that defendants had only one class of purchaser during the freeze base period and that, even assuming clerical error had occurred with respect to Petrofina's price increase, the effective date of that increase would be June 6, 1973, after Mr. Peterson issued instructions to raise the prices for gasoline and diesel fuel to all of Longview's customers. [Findings of Fact (F.F.) 7, 8, 12]. If, as the trial court found, the price

[23] Defendants' position is that American Petrofina should not be included in the same class of purchaser as the jobber class to which the plaintiffs belonged. Defendants' June 20, 1973 letter to the Economic Control Board (Ex. p. 61) indicates that their total gasoline sales to jobbers between June 1 and June 8, 1973, was 517,708 gallons and that of this total 56,957 gallons were at the higher prices, so more than 10% of their total sales during the freeze base period were at the higher prices which defendants continued to charge throughout the freeze period. Petrofina sales were not included in the total gasoline sales to the jobbers.

Plaintiffs' position is that the debit memorandum represents a retroactive backbilling to manipulate the "freeze price." See Note 21.

increase to Petrofina were considered effective June 6, 1973, less than ten per cent of defendants' sales during the freeze base period would be at the higher prices. (F.F. 11).[24] Thus, the district court held that to the extent defendants' charges were in excess of their lower freeze base period prices of 16¢, 18¢, and 15¢ for regular, premium, and diesel fuel, respectively, defendants had violated the Executive Order and plaintiffs were entitled to recover the overcharges they had paid. The district court found that the overcharge of $73,027.59 was a willful evasion of the regulations (F.F. 13), but the court made this determination on the basis of an erroneous conclusion that the civil rather than the criminal standard of willfulness was applicable.

No finding of the amount of plaintiffs' individual purchases or individual overcharges in any sum certain was made as required by the Supreme Court's decision in *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 63 S.Ct. 1141, 87 L.Ed. 1485 (1943), and this court's decision in *Evans v. Suntreat Growers and Shippers, Inc.*, 531 F.2d 568, 571 (TECA 1976), that

> Most importantly, there was no evidence of probative value in the record of any bona fide claim for refund *in any sum certain* to apprise the appellee of any overcharge made by it. (emphasis added)

In fact, the district court did not include the purchases of one plaintiff, J. C. Bell, in the calculation of the freeze period overcharge.[25]

[24] By adding Petrofina's purchases to the total of the jobbers' gasoline purchases and by disregarding the retroactive billing, the defendants' total sales would amount to 626,382 gallons, with only 56,957 gallons at the higher prices. This would not represent ten per cent of the total sales from June 1 to June 8, 1973.

[25] See Note 12.

Formula Period

Following the expiration of the comprehensive price freeze period, new regulations which provided for continued control of the sales prices of covered products purchased or refined by a refiner became effective August 19, 1973. 38 F.R. 22536 (August 22, 1973).

Proper evaluation of the existence of any overcharge during the period in controversy, November 1, 1973 through February 28, 1974, requires cognizance of numerous changes in the regulations. The ceiling price rule applicable to the retail sales of No. 2-D diesel fuel, No. 2 heating oil, and gasoline by a refiner-retailer, reseller-retailer, or retailer was promulgated as 6 CFR § 150.355. As originally issued, section 150.356 was limited to allocating a refiner's increased cost of imports to the base prices for its covered products and the ceiling prices for retail sales of gasoline, No. 2-D diesel fuel, and No. 2 heating oil. Subsequently, increased costs of domestic crude petroleum were included in the regulatory allocation, 38 F.R. 25686 (September 14, 1973), for purposes of arriving at a base price for covered products pursuant to 6 CFR § 150.355(g).[26]

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[26] The regulation, 6 CFR § 150.356, providing for allocation of increased costs incurred by a refiner was amended and republished several times during the fall of 1973. After its original publication in 38 F.R. 22536 (August 22, 1973), it was amended, at 38 F.R. 25686 (September 14, 1973); 38 F.R. 27290 (October 2, 1973), 38 F.R. 30267 (November 2, 1973); 38 F.R. 33577 (December 6, 1973); and 38 F.R. 35473 (December 28, 1973). Effective December 26, 1973, the chairman of the Cost of Living Council, in CLC Order No. 47, 39 F.R. 24 (January 2, 1974), CCH Stabilization Program Guidelines ¶ 48,212, delegated all price stabilization authority over petroleum products and crude oil to the administrator of the Federal Energy Office, which had been created under Executive Order No. 11748, 38 F.R. 33575 (December 6, 1973). The FEO then issued its own regulations, 10 CFR §§ 212.82-83,

The pricing rule for refiners, 6 CFR § 150.355, provided that a refiner could not charge any class of purchaser a price in excess of the base period price of a covered product except to the extent permitted by paragraphs (c) through (k) of § 150.355. Base price was defined in § 150.355(g)(1) as "the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, . . . plus increased costs of imports and domestic crude petroleum incurred between the month of measurement and the month of May 1973 . . ." 38 F.R. 30267 (November 2, 1973). However, for the months of January and February, 1974, base price was defined by the CLC as

> the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus (A) increased product costs incurred between the month of measurement and the month of May, 1973 and measured pursuant to the provisions of § 150.356 [§212.83] and (B) the refiner incentive factor calculated and permitted pursuant to the provisions of § 150.357 [§ 212.84].

6 CFR § 150.355(g)(1)(i), 39 F.R. 979 (January 4, 1974). The FEO's definition of base price at 10 CFR § 212.82(f)(1)(i) originated at 39 F.R. 1924 (January 15, 1974); and the section number changed to correspond with the FEO regulations, but the definition remained the same.

The provisions of 6 CFR § 150.356 and 10 CFR § 212.83 allowed a refiner to increase the May 15, 1973 weighted average price of a covered product by the in-

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at 39 F.R. 1924 (January 15, 1974). During the relevant period for purposes of this suit, the cost allocation regulation, 10 CFR § 212.83 was amended at 39 F.R. 4450 (February 1, 1974); 39 F.R. 4466 (February 4, 1974); and 39 F.R. 7429 (February 26, 1974).

creased product costs allocable to that product under the regulation formula. Basically, when setting the selling price of a covered product, a refiner could add to the May 15, 1973 base selling price of that product the increased crude oil purchase costs allocable to a particular product, plus the increased costs of any purchases of the product by the refiner during the previous month, plus or minus the cumulative over- or under-recovery of increased costs recoverable under 10 CFR § 212.82, minus any recoverable increased cost which the refiner is including in other covered product prices under 10 CFR § 212.83(c)(1)(ii).

Section 212.83 contained a lengthy formula which performed the function of allocating a refiner's increased costs. The combination of § 212.83 and the price rule of § 212.82 provided a method, as did their predecessors, by which a refiner could arrive at its maximum lawful price. Generally, the scheme of 10 CFR § 212.82 (6 CFR 150.355) during the period in controversy was that a refiner could not charge any class of purchaser a price in excess of the base price, but the base price could include increased product costs incurred during the permitted time and measured pursuant to the provisions of 10 CFR § 212.83 (6 CFR 150.356). Thus, the § 212.83 formula delimited product costs which could be included. Mere failure of a defendant to perform the mechanical calculations under the formula in arriving at the price charged for covered products does not in and of itself result in an overcharge, i.e., the sale of a covered product at a price which "exceeds the applicable ceiling" [§ 210(c)] price. The price actually charged (however arrived at) may be below the ceiling price, so a plaintiff would suffer no legal wrong entitling him to relief under § 210 of the Stabilization Act, which was adopted by § 5(a) of the Allocation Act.

In determining the applicable ceiling price, the district court should have made a specific finding of fact as to the dollar amount of defendants' weighted average price for all gasoline and diesel fuel sold on May 15, 1973, to the class of purchaser to which the plaintiffs belonged at that time. Plaintiffs and defendants disputed the inclusion of certain purchasers of gasoline and diesel fuel in the "jobber" class of purchaser to which the plaintiffs belonged. Claiming special purchase agreements, defendants did not include certain purchasers (e.g., Petrofina) in plaintiffs' class when computing the May 15, 1973 price.[27]

In the circumstances of this case, the finding (F.F. 28) of the district court that

> [t]he proper base price as of May 15, 1973, is that which averages all transactions as of May 15, 1973, and is the base price used in the plaintiffs' calculations

is defectively general and all-inclusive in merely accepting "plaintiffs' calculations" of the base price. It omits specific findings of the dollar amount of the May 15, 1973 weighted average price for each product involved[28] as well as the actual base price figure for sales to plaintiffs'

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[27] There was testimony in the trial court to the effect that the terms and conditions of sales to Allied, American Petrofina, Foremost M & A, Sun Oil Company, Exxon, and Thriftyman, Inc., were different from those of sales to the local independent jobbers such as plaintiffs purchasing from Longview. (T.R. pp. 431-438).

[28] The plaintiffs' own CPA-witness testified that the May 15, 1973 price of the product involved was the most important figure in the formula calculations. (T.R. p. 51). The district court accepted plaintiffs' calculations of the overcharge both without determining the defendants' May 15, 1973 weighted average price for regular and premium gasoline and diesel fuel and without plaintiffs' showing their calculation of the May 15, 1973 price for each fuel.

class of purchaser; and a more specific finding should have been made as to whether Petrofina and others claimed to be of a class of purchaser separate from plaintiffs' were included in plaintiffs' class.

Defendants-appellants contend that the district court erred in calculating defendants' allowable prices on an unconsolidated basis. Under the unconsolidated method a substantial overcharge was found to exist while utilization of the consolidated method "ostensibly eliminated the overcharge." (F.F. 19). Essentially, defendants claim that in the process of determining Longview Refining Company's allowable prices they have the right to consolidate Longview's increased product costs with the increased product costs of seven other refinery and marketing affiliates of Crystal Oil Company and allocate to Longview a portion of the combined companies' increased product costs based on the proportion which Longview's sales bear to the combined sales of all consolidated companies.[29]

Whether calculations may be made on a consolidated basis is inextricably bound with the question of the applicable definition of "firm" for purposes of the price regulations in 10 CFR. Subpart B, Definitions, of 10 CFR provides in section 212.31, under the definition of a firm, that:

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[29] According to Finding of Fact No. 19, the affiliated companies of Crystal Oil Company, which were consolidated by defendants for the purpose of calculating the allowable price, were: Longview Refining Company, Berry Refining Company, Adobe Refining Company, Crystal-Princeton Refining Company, Hi-Octane Terminal Company, Tulsa Oil Company, and Stone's Independent Distributors. This finding would not indicate that defendants consolidated the Joe E. Hutchison Distributing Company, although Mr. Burns' testimony at trial indicates that, in fact, the Hutchinson Company was included in the consolidation. (Ex. p. 229-230, T.R. p. 512).

> The FEO may, in regulations and forms issued in this part, treat as a firm: (1) a parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls, (2) a parent and its consolidated entities, (3) an unconsolidated entity, or (4) any part of a firm.

The price rules for refiners are at 10 CFR Subpart E, while marketers, i.e., resellers and retailers, are governed by 10 CFR Subpart F. At the time material to this proceeding, Subpart E provided that "[e]xcept as provided in Subpart F, this subpart applies to each sale of a covered product which is purchased or refined by a refiner." 10 CFR § 212.81. In the regulation governing refiners, Subpart E, 10 CFR § 212.83(b), the FEO specifically provided that a firm "means a parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls." On the other hand, the regulation governing resellers and retailers, 10 CFR § 212.91, stated that the provisions of 10 CFR Subpart F, Resellers and Retailers, apply:

> to each sale of a covered product (other than the first sale of crude petroleum) by resellers, reseller-retailers, and retailers, and to each sale of crude petroleum (other than the first sale) by a refiner. For purposes of this subpart, "*reseller*" *includes any entity of a refiner* which is *engaged in the business of purchasing and reselling covered products, provided that* the *entity does not purchase more than 5 percent* of such covered products from the refiner including any entities which it directly or indirectly controls *and provided further* that the *entity* has *historically and consistently exercised* the *exclusive price authority* with respect to sales by the entity. (emphasis added)

39 F.R. 1924 (January 15, 1974).

The district court concluded that the definition of reseller in § 212.91 referred essentially to those perform-

ing middleman or jobber type functions. (C.L. 8). The court recognized that the regulation allows certain resellers which are subsidiaries of refiners to be consolidated with the refiner in a calculation of its allowable prices but determined that the definition of reseller does not apply to this case, because the retail distribution arms of Crystal Oil Company qualify as retailers, or as reseller-retailers, rather than strictly as resellers.[30] (C.L. 8, 9). Rather than determining whether the marketing entities should be excluded from treatment under 10 CFR Subpart F, Resellers and Retailers, as required by § 212.91, which provides a specific exclusion for certain firms meeting the definition of a reseller as defined in that section, the court made its determination that the

[30] The district court stated, in Conclusion of Law No. 9, that "the retail distribution arms of Crystal Oil Company qualify as 'retailers,' and their pricing is governed by Subpart F. It matters not that the retail distribution subsidiaries might qualify as 'resellers-retailers' for the special provisions contained in Sec. 212.91 apply only to 'resellers.'" (Br. App. p. 72). Thus the court did not make a specific determination as to whether or not Crystal Petroleum Company, Joe E. Hutchinson Distributing Company, Tulsa Oil Corporation, and Stone's Independent Oil Distributors, Inc. were resellers-retailers. It merely concluded that the record failed "to reveal any basis for treating them as 'resellers.'" (C.L. 9, Br. App. p. 72).

A reseller-retailer is, under 10 CFR § 212.31, "a firm (other than a refiner) or that part of such a firm which carries on the functions of both a reseller and retailer"; whereas, under 10 CFR § 212.31, a reseller is defined as "a firm (other than a refiner or retailer) or that part of such a firm which carries on the trade or business of purchasing covered products, and reselling them without substantially changing their form to purchasers other than ultimate consumers." A retailer is defined by § 212.31 as "a firm (other than a refiner or reseller) or that part of such a firm which carries on the trade or business of purchasing covered products and reselling them to ultimate consumers without substantially changing their form." 39 F.R. 1924 (January 15, 1974).

marketing entities of Crystal would not meet the general defintion of a reseller of 10 CFR Part 212.31, a definition which would not include a firm which resells covered products to ultimate consumers. That the general definition was used is evident from the following excerpt from Conclusion of Law No. 9:

> The record fails to reveal any basis for treating them as "resellers", *i.e., firms which purchase covered products and resell them without substantially changing their form, to purchasers other than ultimate customers.* But the record, (*e.g.*, Mr. Burns' reference to them as "retailers" and "reseller-retailers") and public disclosures, *i.e.*, the annual reports, by Crystal Oil Company, show that the named subsidiaries are retailers. Accordingly, that portion of Sec. 212.91 further defining "reseller" has no application. (emphasis added)

Thus, the court erroneously used the definition of reseller under Subpart R, 10 CFR § 212.31, rather than the definition of a reseller specifically set out in Subpart F, 10 CFR § 212.91, to determine the application of the exclusionary provisions of § 212.91.

FEA decisions and orders interpreting the mandatory pricing regulations promulgated by the agency make it clear that the definition of reseller contained in 10 CFR § 212.91, which definition is solely for the purposes of Subpart F, Resellers and Retailers, is intended to include the marketing entities of a firm.[31] Upholding an opinion

[31] The great deference to be granted an agency's interpretation of its own regulations has been examined by this court many times. See *Pasco, Inc. v. FEA*, 525 F.2d 1391, 1400-1401 (TECA 1975), and *Cities Service Company v. F.E.A.*, 529 F.2d 1016, 1022-1023 (TECA 1975), *cert. denied* 423 U.S. 827, 96 S.Ct. 3166 (1976), and authorities cited therein.

and order requiring Puerto Rican marketing affiliates and parent refiners to be treated as a single entity under the refiner's pricing rule, the FEA stated:

> As originally promulgated, the price rules also provided that a marketing affiliate of a refiner would be treated separately under the reseller pricing rule, which provides for a dollar-for-dollar pass through of increased product costs, provided that the affiliate purchased less than five per cent of the petroleum products which it marketed from its parent firm. . . . The application of the rules was not only frustrating the achievement of ". . . equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry . . ." (EPAA, Section 4(b)(1)(F)), but was also leading to the occurrence rather than the ". . . minimization of economic distortion . . ." (EPAA, Section 4(b)(1)(I)).

Esso Standard Oil S. A., Ltd., Exxon Corp., Case No. FEA-0275 (filed 10-22-74, decided 11-14-74), 1974 CCH Energy Management Transfer Binder ¶ 20,177, at p. 20,301.

The FEA denied the exception application of the U.S. Virgin Islands marketing branch and quoted the Interpretation requiring consolidation with domestic operations of Exxon:

> Thus, a *subsidiary* of Exxon Corporation operating in the U. S. Virgin Islands *which buys more than 5 percent of its covered products from a foreign seller which is controlled by that subsidiary's* U. S. *Parent firm* (consolidated and unconsolidated, directly or indirectly controlled), *is a "refiner,"* and is required to price its product in accordance with the regulations governing refiners set forth in Subpart E of Part 212, Title 10, Code of Federal Regulations. (emphasis added)

Esso Standard Oil S. A. Ltd., Case No. FEE-1025 (filed 7-30-74, decided 12-20-74), 1974 CCH Energy Management Transfer Binder ¶ 20,748, at pp. 20,964-20,965. In accord with respect to Esso Eastern Guam Branch is *Esso Eastern Inc.*, Case No. FEE-0915 (filed 6-14-74, decided 12-23-74), 1974 CCH Energy Management Transfer Binder ¶ 20,752, at p. 20,976, in which the FEA stated in reference to the definition of "firm" in 10 CFR § 212.83(b) that "Only those entities of Exxon, or any other refiner, which meet the criteria set out in Section 212.91 are subject to the reseller pricing rules." Esso Eastern had sought treatment as a reseller-retailer by arguing that it was an independent firm.

As indicated in *Esso Standard Oil S. A., Ltd., Exxon Corp., supra*, policy considerations favor consolidation. In *Getty Oil Company (Eastern Operations), Inc., Skelly Oil Company*, Case No. FEE-1101 (filed 9-11-74, decided 2-11-75), 1975 CCH Energy Management Transfer Binder ¶ 83,041 at p. 83,108, the FEA emphasized the equitable pricing objective of section 4(b)(1)(F) of the Allocation Act in its statement that "[b]y requiring a firm to combine all of the product cost increases which it has incurred for the purpose of determining its maximum permissible selling prices, the pricing rules applicable to refiners serve to effectuate that stated Congressional objective." The purpose of consolidating the costs which a refiner experiences across the country was to avoid imposing "any pricing anomalies that occur in a particular geographic region or on a given date . . . directly and disproportionately . . . [on] a small segment of the firm's customers. . . ." *Getty Oil Co., supra*, at p. 83,108. The FEA compared the provisions of § 212.83, which requires companies controlled by a common parent to combine their product and non-product cost increases as a single firm for the purposes of Subpart E-Refiners, in determining their maximum permissible selling prices,

to the provisions of 10 CFR § 211.67, commonly referred to as the Entitlements Program.[32] *Getty Oil Co., supra,* at p. 83,108-109. Both provisions were designed to spread cost disparities among all purchasers in order to achieve equitable prices in all regions of the country. Since Getty Eastern and Skelly were controlled by a common parent, the FEA concluded they were a single firm under Subpart E, so they had to determine prices on a consolidated basis. The FEA did grant their request for exception from Subpart E consolidation.

Thus, the companies which (1) come within the meaning of firm in subpart E and (2) are not excepted by Subpart F § 212.91 or granted exception relief by the FEA are subject to the pricing provisions of 10 CFR Part 212, Subpart E-Refiners, and should, pursuant to those regulations, combine their increased product costs with those of other affiliated entities in the same firm in determining their allowable prices.

Conclusions of Law No. 9, 10, and 11 are erroneous in that the four companies, Berry Refining Company, Adobe Refining Company, Crystal-Princeton Refining Company, and Hi-Octane Terminal Company, which are either refiners or treated as refiners, were not consolidated to the extent permissible in calculating defend-

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[32] As stated by this court in *Cities Service Co. v. F.E.A.*, 529 F.2d 1016, 1021 (TECA 1975), *cert. denied*, 423 U.S. 827, 96 S.Ct. 3166 (1976):

> The basic purpose of the Entitlements Program was to spread the benefit of access to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products, while retaining the incentives for increased production and anti-inflationary measures which the two-tier price system provided.

ants' ceiling prices under the regulations.[33] On remand, facts regarding acquisition and operation of the various companies must be taken into account in calculating defendants' ceiling prices on a consolidated basis. Should it be determined that any or all of the non-refiner companies are subject to the exclusionary provisions contained within the definition of a reseller in Subpart F, section 212.91,[34] defendants' consolidation of those companies for purposes of calculating the allowable price for the products sold by Longview Refining Company would be proper under Subpart E, section 212.83. See *Kerr-McGee Corporation*, Case No. FEE-0930 (filed 6-24-74, decided 9-12-74), 1974 CCH Energy Management Transfer Binder ¶ 20,658.

The defendants-appellants contend that the district court erred by completely accepting the plaintiffs' calculations (C.L. 11) despite the fact that plaintiffs plainly disregarded specific definitions within the regulation. For example, under the price rule in 10 CFR § 212.83(c)(2), the superscript "t" means the month of measurement, which is defined as the month *preceding* the current month. In contravention of this express definition, plain-

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[33] As found by the district court (F.F. 22, Br. App. p. 67), Crystal Oil Company acquired Longview Refining Company on November 1, 1973, and Adobe Refining Company on November 30, 1973; and Crystal-Princeton Company was not in operation as of February, 1974. Subpart H, New Items, of the price regulations, particularly section 212.111, affects determination of the "base price." See *Coastal States Gas Corp.*, Case No. FEE-2315 (filed 3-15-76, decided 6-29-76), 1975-76 CCH Energy Management Transfer Binder ¶ 83,252. See 39 F.R. 1924 (January 15, 1974) and amendment in 39 F.R. 6530 (February 20, 1974).

[34] There was testimony in the trial court to the effect that Tulsa Oil Company, a non-refiner, may not have met the 5% rule for two or three months and thus might not be subject to consolidation at least for those months. (T.R. p. 551). See Notes 29, 30.

tiffs' calculations were based on using the current month as the month of measurement. At trial, the plaintiffs' witness maintained that the procedure of applying the same month's sales to that month's purchases instead of the previous month's would not make a difference. As the defendants pointed out, if the formula were properly employed in this case, March revenues would be used in the plaintiffs' charts and August revenues would not be included. (T.R. 165-166). Thus, the plaintiffs' charts are inaccurate.

Finding of Fact No. 17 completely disregards the regulations in effect as of January and February, 1974, defining base price as "the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus (*a*) increased product costs incurred between the month of measurement and month of May, 1973 and measured pursuant to the provisions of § 212.83 *and* (*b*) the refiner incentive factor calculated and permitted pursuant to the provisions of § 212.84." (emphasis added) 10 CFR § 212.82(f)(1)(i), 39 F.R. 1924 (January 15, 1974). The refiner incentive factor was in effect during January and February and applied to No. 2-D diesel fuel, *inter alia*. When properly applied, this factor affects not only the price of the No. 2-D diesel fuel sold to plaintiffs,[35] but also the price of gasoline. 10 CFR § 212.82(f)(2)(i) and (ii). The refiner incentive factor should have

[35] The refiner incentive factor (See Appendix C) was in effect for January and February and applied to No. 2-D diesel fuel, which basically meant that the defendants could increase their May 15, 1973 price for No. 2-D diesel fuel by two cents per gallon, the end result being that the overcharge reflected in plaintiffs' schedules would be less (T.R. 198). The plaintiffs' CPA testified (1) that he did not take the refiner incentive factor into account (T.R. pp. 89, 196) and (2) that he did not know whether or not the plaintiffs had purchased any No. 2-D diesel fuel (T.R. p. 199).

been considered at least to the extent of making a finding of fact as to the amount of plaintiffs' purchases, if any, of No. 2-D diesel fuel.

Also, the regulations then effective provided in Subpart E that "transactions between affiliated entities may be used to calculate increased product costs." 10 CFR § 212.83(e), 39 F.R. 1924 (January 15, 1974). Contrary to the provisions in the regulations for including the increased costs of refined petroleum products purchased by a refiner for resale, the plaintiffs' calculations did not include any costs of finished gasoline or diesel products defendants purchased from an affiliated entity. The record does not reflect that the affiliated company transactions were made at improper prices.

As to the court's finding that these overcharges must be presumed to have been deliberate,[36] the plaintiffs' CPA testified that he had previously asked the defendants' accountant, Mr. Leeseman (who was no longer employed by the defendants at the time of trial)[37] whether or not he had any calculations on the basis of the pricing formula under Phase IV regulations. According to plaintiffs' accountant, Leeseman responded that he did not have any calculations although he had read the formula because he found it beyond his understanding and consequently did not attempt to apply it. (T.R. p. 16).

[36] In Conclusion of Law No. 15, the district court stated: "[T]his is a case of total failure to follow the formula over a protracted period of time, resulting in a substantial, and what must be presumed to be a deliberate overcharge." (Br. App. p. 75).

[37] Leeseman was responsible for pricing defendants' products through approximately mid-January, 1974. Mr. Burns, the CPA who testified for defendants at trial, was hired in late December, 1973; and from mid-January, 1974, he was responsible for providing defendants' management with prices meeting the regulations.

However, mere failure to employ the formula in the process of arriving at prices would not constitute a legal wrong under § 210 of the Stabilization Act for which plaintiffs can recover. It is intentionally charging a price known to be in excess of the applicable ceiling price allowable under the pricing regulations containing the formula which would constitute a willful overcharge.[38]

It is difficult, even for experts, to understand these complex regulations, as is evidenced by the frequent correction, modification, change, and clarifying rulings and by the fact that cross-examination of plaintiffs' own CPA witness drew admissions that he had twice made substantial errors in calculating the overcharges claimed.[39]

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[38] Under 10 CFR § 212.10, which sets out the general rules for 10 CFR Part 212, it states in (a): "*No firm* (including an individual) *may charge a price* for any covered product *which exceeds the maximum price* at which that product is permitted to be sold to the class of purchaser concerned under this part." (Emphasis added) 40 F.R. 60036 (December 31, 1975). But as issued and effective during the months of January and February, 1974, which are involved in this lawsuit, the regulation stated:

> § 210.10(a) *No firm* (including an individual) *may charge a price* with respect to any sale or lease of an item after January 15, [1974] *which exceeds the price permitted* under this part for that item. (emphasis added)

39 F.R. 1924 (January 15, 1974).

[39] The plaintiffs' CPA admitted that plaintiffs' first exhibit showing defendants' overcharges, Exhibit 6 (Ex. p. 131-134) V overstated the overcharge due to the miscalculations of the V factor of the formula. (T.R. p. 155). After the first exhibit was recalculated, the plaintiffs admitted that Exhibit 6A (Ex. p. 136-140), as recalculated, grossly overstated the overcharge. (T.R. p. 359). In allocating the percentage of the overcharge paid by them, the plaintiffs had used their purchases against the defendants' total sales, rather than against the defendants' total sales of regular, premium, and diesel

Fairness requires clear and convincing proof of the willfulness of the overcharge.

The district court erroneously inferred "from the cross-examination" of plaintiffs' CPA witness by defendants' counsel that at the material times in controversy defendants had the same understanding and knowledge of these complex regulations that their counsel had after a year's time (from commencement of this action) in which to prepare for trial.[40]

Considering the errors, inadequacies, facts, and circumstances reflected by the record, the court is of the firm conviction that a mistake has been made in the

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gasoline. (T.R. p. 359, 424). Then the plaintiffs recalculated Exhibit 6A and introduced Exhibit 6B. (T.R. p. 592, Ex. p. 168-170). See Note 9.

Plaintiffs not only had the benefit of hindsight in applying the formula (T.R. p. 174-175) but also were able to use *actual* sales volumes for each month rather than the estimated sales figure defendants would have had to use during the period in controversy. The FEA has recognized that some inaccuracy will be present in the prices refiners charge based on the formula and has constructed the formula

> to provide a self-correcting mechanism for over and under recoupment of increased costs, in recognition of the fact that base price determinations in each month must necessarily rely on estimated sales volumes, which may turn out to be inaccurate.

Phillips Petroleum Company, Case No. FEA-0384 (filed 3-24-75, decided 5-30-75), 1975 CCH Energy Management Transfer Binder (2 FEA) ¶ 80,599, at p. 80,831.

[40] The court stated:

> Maybe you ought to settle this case. Well, it's certainly evident to me from the cross-examination that's been made that the defendants had a very good conception, or it would appear that they had a very good conception of what was going on in relation to these regulations. (T.R. p. 429).

findings, conclusions, and judgment rendered and that this case should be remanded for a new trial. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *United States v. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

Joinder of Administrative Agency

The record reflects that the Cost of Living Council, the Internal Revenue Service, the Federal Energy Office and its successor agency, the Federal Energy Administration,[41] have considered, investigated, or determined various aspects of plaintiffs' case; in particular, the Cost of Living Council has received justifications for the freeze period prices defendants charged their local jobbers (see T.R. p. 455 and Ex. p. 61); plaintiff Bill Shore was required to make refunds due to freeze period violations following an I.R.S. investigation of his freeze period charges and defendants' freeze period prices (T.R. p. 302, 315-316); the defendants' Phase IV pricing formula calculations were examined by the I.R.S. (T.R. p. 481-482); and the FEA issued a decision dealing with defendants' credit terms, *Crystal Oil Company*, FEA-0142 (filed 7-9-74, decided 10-8-74), 1974 CCH Energy Management Transfer Binder ¶ 20,161.

On remand, the district court should order the FEA, which has expertise and responsibility with respect to interpreting, applying, and enforcing the statutes and the pricing regulations in controversy, including corrective action for any unlawful price increase passed down

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[41] The FEA, established by the Federal Energy Administration Act of 1974, 15 U.S.C. § 761 et seq. (1976 Supp.), succeeded the FEO and was empowered with all of the President's authority under the Allocation Act, pursuant to section 2(a) of Executive Order No. 11790, 39 F.R. 23185 (June 27, 1974).

the stream of commerce by a plaintiff,[42] to be joined as a party to this litigation. See this court's decisions in *Associated General Contractors v. Laborers Int. U. Local 612*, 476 F.2d 1388, 1405-1407 (TECA 1973); *Air Products and Chemicals, Inc. v. United Gas Pipe Line Co.*, 503 F.2d 1060, 1062 (TECA 1974).

If the parties fail to obtain the testimony of a witness from Petrofina to determine the truth regarding the existence of an agreement on June 4, 1973, between Longview and Petrofina to raise prices covering transactions occurring during the base period June 1 to June 8, 1973 (T.R. 451, 453), also the testimony of Mr. Leeseman, the defendants' former accountant, regarding defendants' understanding and application of the pricing formula, the court may, in the interest of truth and justice, call and examine such witnesses. *Chalmette Petroleum Corp. v. Chalamette Distributing Co.*, 143 F.2d 826 (5 Cir. 1944).

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[42] See Note 38. Also, the general rules of 10 CFR Part 212 as in effect during the months relevant in this suit stated:

> § 212.10 GENERAL RULES.
>
> . . . (b) *No firm* (including an individual) *may knowingly pay a price* with respect to any sale or lease of an item which *exceeds* the price permitted under this part, for that item. However, *this paragraph does not apply to the sale or lease of an item* to any firm (including any individual) *under circumstances of economic* or other *coercion in which the buyer* or lessee, because of his need for that property or service, *had no reasonable alternative* but to pay the illegal price, *and he reports the sale or lease to the Federal Energy Office for investigation promptly.* (emphasis added)

39 F.R. 1924 (January 15, 1974). The current regulations, 10 CFR § 212.10(b) and (c) are to the same effect. 40 F.R. 60036 (December 31, 1975).

Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

NO. 5-17

LONGVIEW REFINING COMPANY
AND CRYSTAL OIL COMPANY,

Appellants,

v.

W.R. (BILL) SHORE, et al.,

Appellees.

BEFORE HONORABLE JOE INGRAHAM, HONORABLE MARTIN D. VAN OSSTERHOUT, AND HONORABLE JOE EWING ESTES, JUDGES

Upon consideration of plaintiffs-appellees' Petition Rehearing

IT IS ORDERED that said Petition is denied.

FOR THE COURT:

/s/
Ruth H. Jacobson
Clerk

March 23, 1977

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

W.R.(BILL) SHORE, et al	)	
	)	C. A. NO.
v.	)	
	)	TY-73-CA-268
LONGVIEW REFINING CO., et al	)	

JUDGMENT

BE IT REMEMBERED that on the 9th day of December, 1974, came on to be heard before the Court, the above numbered and entitled cause. After due deliberation, the Court having heard the evidence, and considered briefs and arguments of counsel, and after making and filing findings of fact and conclusions of law on January 22, 1976, hereby renders this judgment in favor of the Plaintiffs and against the Defendants in accordance with the provisions of alternative no. 1 under Section 210 of the Economic Stabilization Act of 1970. Alternative no. 1 provides for trebling of the amount of the Court's award of actual damages.

IT IS ACCORDINGLY, ORDERED, ADJUDGED, and DECREED by the Court that the Plaintiffs do have and recover of and from the Defendants the sum of $518,053.71, together with interest at the rate of six (6%) per cent per annum from the day of this judgment until paid.

It further appearing to the Court that the attorney representing the Plaintiffs in

this action is entitled to a reasonable attorney's fee in accordance with the provisions of law, to be set by the Court in its discretion and in accordance with established and accepted standards for assessment of attorney's fees, and it further appearing to the court that the Defendants have evidenced an intent to prosecute an appeal from this judgment, and that the attorney for the Plaintiffs would be entitled under law to attorney's fees for any services rendered in connection with such appeal, and the Court being of the opinion that the attorney's fees should be set after final determination of the outcome of the appeal, and the attorneys for the Defendants having agreed that such procedure would be acceptable, it is

ACCORDINGLY, ORDERED, ADJUDGED, and DECREED by the Court that the Plaintiffs are hereby awarded a reasonable attorney's fee, with the amount of such fee to be set by the Court upon proper motion and after final determination of any appeal that may be taken from this judgment or when this judgment becomes final if no appeal is taken.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED by the Court that the Plaintiffs do have and recover of and from the Defendants all costs of court, for which let execution issue.

SIGNED and ORDERED this 23rd day of February, 1976.

Original signed by
Wm. Wayne Justice
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

W.R.(BILL) SHORE ET AL	)
V.	)NO. TY-73-CA-268
LONGVIEW REFINING COMPANY, ET AL	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court having heard the evidence, and considered briefs and arguments of counsel, hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

Background Facts

1. Plaintiffs, at pertinent times, have been in the business of purchasing gasoline and diesel fuel directly from one or more refineries and reselling the gasoline to or through service station facilities for retail distribution to customers. All have been purchasers of gasoline and/or diesel fuel from the defendant Longview Refining Company for varying periods of time.

2. Defendant Longview Refining Company is a domestic corporation which owns and operates a refinery in Longview, Texas. Prior to its acquisition by Crystal Oil Company of Shreveport, Louisiana, the stock of Longview Refining Co. was privately held. Longview Refining Company became a wholly-owned subsidiary of Crystal Oil Company,

effective November 1, 1974.

3. Defendant Crystal Oil Company owns all of the outstanding corporate stock of the following corporations (in addition to Longview Refining Company): Berry Petroleum Corporation; Cyrstal Service Corporation; Crystal Resources Incorporated; Crystal Indonesia Oil Corporation; Mercury Discount Corporation; Tulsa Oil Corporation; Crystal Petroleum Corporation; Stone's Enterprises, Incorporated; Stone's Independent Oil Distributors, Incorporated; Panhandle Towing Company; Hi-Octane Terminal Company; Joe E. Hutchison Distributing Company; Adobe Refining Company; Crystal Princeton Refining Company; Crystal Sharjah Oil Company; and Crystal-Rico Company.

4. The Crystal subsidiaries are located in various parts of the United States and overseas, and service different market areas. Some of the companies are engaged in refining, while others are engaged in retail distribution, crude oil production and non-petroleum industry activities.

5. Phase IV pricing regulations were ushered in by Presidential Proclamation or Executive Order establishing a "freeze" period, effective June 15, 1973. The "freeze" period was due to expire on August 12, 1973, but was extended to August 19, 1973. On August 19, 1973, the "freeze" period was superseded by regulations promulgated pursuant to the Economic Stabilization Act of 1970. The Phase IV price regulations were originally codified in Part 150, but subsequently recodified in Part 221 of Chapter II of Title 10 of the Code of Federal Regulations enacted pursuant to the Emergency Petroleum

Allocation Act of 1973 were codified in Part 211, and administrative procedures applicable thereto were set forth in Part 205. The Emergency Petroleum Allocation Regulations as applicable here, became effective January 15, 1974. (The official citations are as follows: Emergency Allocation Act of 1973, P.L. 93-159, E.O. 11748; 38 F.R. 33577; Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11748, 38 F.R. 33575; Cost of Living Council Order No. 47, 38 F.R. 24.)

6. During the "freeze" period of the Phase IV regulations and for approximately two and one-half months after the effective date of the pricing regulations under Phase IV, Longview Refining Company was a privately-owned, wholly independent corporation.

Facts Pertaining to "Freeze" Price

7. From May 25, 1973 through approximately June, 1973, the prices in effect at Longview Refining Company for all customers were .1600 cents for regular gasoline, .1800 cents for premium gasoline, and .1500 cents for diesel fuel (P.Ex.1). As of June 7, 1973, the prices were changed, making the prices .1725 for regular gasoline, .1925 for ethyl gasoline, and .1625 for diesel fuel. (P.Ex.2, page 4; Price Book information obtained from defendant Longview Refining Co. Inc.)

8. Longview Refining maintained a multi-price level, i.e., charged different prices to different customers, until the enactment of the price increase effective May 25,1973.

Thereafter, and at all times during the freeze period, all customers were charged the same prices. There was no distinction in customers as to price, and no separate classes for pricing purposes within the meaning of Sec. 8 of Executive Order No. 11723, 38 F.R. 15763, June 15, 1973.

9. Defendant Longview Refining Company did not sell at least 10% of the gasoline and diesel fuel sold during the period June 1st through June 8th, at the higher price of .1725 for regular,.1925 for premium, and .1625 for diesel. More than 90% of the gasoline and diesel sold during such period was sold at the lower prices of .1600 for regular, .1800 for premium, and .1500 for diesel. (R. 25-27).

10. Sales by Longview Refining Company to American Petrofina were made at prices of .1600 for regular gasoline,.1800 for premium gasoline, and .1500 for diesel fule, from May 25, 1973, the effective date of the pricing, through June 16, 1973. On June 16, 1973, a debit memorandum was issued raising prices to American Petrofina to the level of .1725 for regular gasoline, .1925 for premium gasoline, and .1625 for diesel fuel, retroactive through June 4, 1973. (R. 452).

11. Considering all purchases during the period of June 1st through June 8th, the retroactive billings to American Petrofina through June 4th, are necessary in order to insure that at least 10% of the total purchases were at the increased prices. If the price increase for American Petrofina be considered effective the same day as it became effective for other customers, i.e., on June 6, 1973, according to undisputed testimony, the result is that less than 10% of total sales were made at the higher prices during the "measurement" period (June 1 through June 8).

12. Even assuming that there was bona fide clerical error in failing to put the increase in effect for American Petrofina originally, the date such increase would have gone into effect was the same date as the price increase became effective for other customers, i.e., on June 6, 1973. French Peterson, who was president of Longview Refining during the "freeze" period testified that he had given instructions to raise all customers' prices on June 6. (R. 439, R. 447, R. 440). Reba Morrow testified that she received the instructions to put the price increase in effect for all customers at the same time (R. 473) (though she did not recall whether the date was the 4th, 5th, or 6th of June, R. 472-3). Thus, when the oversight was detected on June 16, the benefit of hindsight was used deliberately in order to retroactively "back-bill" through June 4th, to achieve sufficient sales at the higher price to justify "freeze" charges at the higher levels.

13. The resulting overcharge of $73,027.59 was deliberate and intentional, and knowingly made, and amounted to a willful evasion of the regulations.

14. Plaintiffs did not discover the overcharge during the freeze period until suit was instituted and during the course of discovery. Defendants denied the overcharge from the time the issue was first raised, and any request for refund for the concealed overcharge would not

only have been impossible prior to suit, but would have been futile if made.

Facts Pertaining to Pricing Regulation Violations

15. Since August 19, 1973, refiners have been required to determine their pricing pursuant to a formula specified in 212.83(c)(2) of 10 C.F.R. Chapter II, and its predecessor Part 150.355.

16. Through the application of a formula, a refiner is permitted to determine the increment per unit (i.e., the amount per gallon) of increased cost per particular product (gasoline, diesel, etc.) accruing after May 15, 1973, and add such increment to the base price of the product, i.e., the respective prices charged to each class of customer for that particular product as of May 15, 1973. The resulting price then becomes the "base" price, i.e., "the maximum allowable price for the particular product to the respective class of customer for the current month", i.e., the month for which the price is established.

17. Section 212.82(a) provides that a refiner may not charge to any class of purchaser a price in excess of the base price except to the extent permitted pursuant to the provisions of paragraph (c) through (k), the reference being to the pricing formula and rules relating thereto. Section 212.82(f) says that the base price is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned, on May 15, 1973, plus increased product cost incurred between the month of measurement and the month of May, 1973, and measured

pursuant to the provisions of Sec. 212.83 (which contains the formula for allocating increased cost and determining the increment of increased cost which may be lawfully added to the May 15, 1973 base price.)

18. Defendants totally failed to follow price regulations and specifically the pricing formula embodied in Section 212.83(c)(2). The method used to arrive at prices prior to February, 1974 (identified as Mr. Leesemann's method) did not follow the formula. Defendants' accountant, Mr. Burns, admitted that the formula had not been properly followed prior to February, 1974, and in that month he applied the formula on an unconsolidated basis (without making allowance for accumulated overcharge) but his calculations will not tie to the prices charged because defendants' representative, Mr. Morgan, ultimately set and controlled the price. Commencing in March, after conference with attorneys (and apparently having due recognition for the large overcharge that had accumulated which Mr. Burns admitted) defendants determined to use a "consolidated' approach to the formula, but stated this was not put into effect until July or August. There is no explanation as to the method of setting prices in the interim period. Since invoking the consolidated approach, calculations have been made, but they still do not tie to prices charged, again because prices have been left to the ultimate determination and control of Mr. Morgan.

19. After first making calculations on an individual, i.e., unconsolidated basis, Mr. Burns, defendants' accountant, and

defendants' attorneys, decided to apply the formula on a consolidated basis. (R. 482). This decision was apparently made in February or March, 1974. The testimony is that Mr. Burns and the attorneys collaborated on the calculations relating to the price effective February 4, 1974, which were on an unconsolidated basis. (R. 531). Mr. Burns stated that the decision by him and the attorneys to make calculations on a consolidated basis was made "around March" (R. 482) (though they apparently were jointly working on calculations as early as January, for the February 4 prices). Calculations by Mr. Burns and the attorneys on an unconsolidated basis revealed a very substantial overcharge. (R. 539-541). This overcharge was not taken into account in calculating the price on an unconsolidated basis. (R. 541). The calculations on the consolidated basis, which actually did not commence until July or August, 1974, ostensibly eliminated the overcharge. The entities, i.e., subsidiaries of Crystal Oil Company, consolidated for the purpose of the calculations, were Longview Refining Company, Berry Refining Company, Adobe Refining Company, Crystal-Princeton Refining Company, Hi-Octane Terminal Company, Crystal Petroleum Company, Tulsa Oil Company, and Stone's Independent Distributors. (R. 483).

20. In making the consolidation, defendants consolidated the refining companies (Hi-Octane, a blending company, being considered as a refining company) and those companies that were purportedly "resellers and retailers". (R. 547). All other subsidiaries of Crystal Oil Company were ignored in the consolidation, as was

Crystal Oil Company, the parent.

21. Through the consolidation, the defendants took costs applicable to all consolidated companies back to August, 1973, averaged such costs, arrived at an allocation factor, and apportioned costs between all the companies. (R. 547).

22. Longview Refining Company was not owned by Crystal Oil Company on August 1, 1973, not being acquired until the effective dated of November 1, 1973. (R. 547). Adobe Refining Company also was acquired after August, i.e., on November 30, 1973. The financial statement of Crystal Oil Company shows that Crystal-Princeton was acquired on December 14, 1973, but refining processes did not begin until July, 1974. (R. 548). Therefore, three of the four refineries packaged in the consolidation were acquired by Crystal Oil Company well after the pricing regulations went into effect.

23. The defendants have not properly followed the pricing formula which has resulted in a substantial overcharge. The amount of the overcharge attributable to plaintiffs through February, 1971, is shown on Page 6 of plaintiffs' Exhibit 6, i.e., $99,656.98.

24. The overcharge was willfully made, defendants having deliberately and intentionally manipulated application of the formula, with which they evidenced thorough familiarity, from the time that Mr. Burns and the attorneys began collaborating regarding calculations, for the evident purpose of preventing recoupment of overcharges through proper application

of the formula. Under the circumstances, it is clear that any request for refund on the part of the plaintiffs, prior to suit, would have been ignored by defendants.

Facts Relating to Monthly
Price Increases and Base Price

25. Defendants disregarded the explicit provisions of Section 212.82(f)(2) and enacted multiple monthly price increases in December, 1973 and January, 1974.

26. Plaintiffs have not sought to assess damages by calculating the amount of increased price paid as a result of unauthorized increases in the month of January and/or December, but instead have sought damages on the basis of the overall cumulative effect of the overcharges. The multiple monthly price increases, however, illustrate the willfulness of the violations by defendants.

27. Defendants made use of an improper "base" price as of May 15, 1973, resulting from failure to include all transactions had on that date for purposes of calculating the base price.

28. The proper base price as of May 15, 1973, is that which averages all transactions as of May 15, 1973, and is the base price used in plaintiffs' calculations.

Facts Pertaining to
Credit Term Violations

29. Plaintiffs have withdrawn all requests for relief by virtue of alleged credit term violations, having been satisfied in this regard by compliance of defendants with a

Federal Energy Administration ruling.

Facts Pertaining to
Allocation Regulation Violation

30. Plaintiffs have withdrawn all requests for relief with respect to alleged allocation regulation violations due to an easing of the supply situation. The withdrawal of the claims is without prejudice to the plaintiffs' institution of action(s) seeking relief, by reason of any alleged future damages resulting from defendants' allocation system.

Miscellaneous Findings of Fact

31. Defendants displayed a thorough knowledge of the applicable regulations, but wholly failed to follow those regulations and failed to maintain "procedures reasonably adapted to the avoidance" of error. The violations described in these findings were not the result of a bona fide error but were the intentional actions of the defendants and therefore willful. Hence there was no necessity for plaintiffs to first present to the defendants a claim for a refund, and such would have been a futile gesture.

32. The record shows that plaintiffs formerly purchased approximately 20% of the output of the Longview Refining Company. Since acquisition of Longview by Crystal on November 1, 1973, plaintiffs' purchases have declined to approximately four to five percent of the total output. Some of the plaintiffs no longer make any purchases from the Longview Refining Company. Therefore, it is apparent that if refund through the formula is attempted, some

plaintiffs would recover nothing, while the others would recover only a fraction of the overcharge exacted from them.

CONCLUSIONS OF LAW

1. The retroactive billing through June 4th was a device used to achieve justification for charging increased prices during the freeze period. Furthermore, under the definition of "transaction" contained in Sec. 8 of the "freeze" order, the prices that must control are those which are actually charged at the time of the sales in question, and not subsequent additions through retroactive billings or debit memos. Otherwise the door would be open to fraud.

2. The defendant Longview Refining Company made illegal overcharges during the freeze period, which, based upon gallons of regular, premium and diesel purchased by the plaintiffs, as shown on page 2 of plaintiffs' exhibit 2, amounts to $73,027.59

3. Plaintiffs are entitled to recovery of penalties and attorney's fees under the terms of the Economic Stabilization Act by virtue of the overcharge during the freeze period.

Conclusions of Law Pertaining to Pricing Regulations

4. The intent of the pricing regulations is to hold prices to the May 15, 1973 level adjusted on a month to month basis (not more than once each month) to allow the "pass through" of permissible increased cost to be determined in accordance with

the formula. An increase over the May 15, 1973 price is permissible only through application of the formula. The owrding of the regulations clearly mandates that no increase is to be permitted if the formula is not used.

5. "Refiner" is defined in Sec. 212.31 as "a firm (other than a reseller or retailer) or that part of such a firm which refines covered products or blends and substantially changes covered products or refines liquid hydrocarbons from oil and gas field gases, or recovered liquified petroleum gases incident to petroleum refining and sells those products to resellers, retailers, reseller-retailers, or ultimate consumers. 'Refiner' includes any owner of covered products which contracts to have those covered products to resellers, retailers, reseller-retailers or ultimate consumers".

6. The definition of "refiner" as a firm other than a reseller or retailer clearly evidences the intent to consider refiners separately for pricing purposes. Subpart (f) of the regulations sets forth the pricing rules regarding resellers and retailers. Previous definitions of "refiner-reseller" and "refiner-retailer" which originated in 38 F.R. 27290 were deleted with the passage of 38 F.R. 33577, embodying the regulations with which this case is concerned.

7. The definition of "firm" contained in Sec. 212.31 makes it clear that any "part" of a firm may be treated separately for pricing purposes, and this includes separately incorporated subsidiaries wholly-owned by a holding company. It is equally clear that it is the intent of the regu-

lations, as evidenced by the definition of "refiner", that separate treatment be accorded to refiners for pricing purposes. The separate treatment accorded resellers and retailers in subpart (f) of the regulations reinforces this conclusion.

8. The definition of "reseller" contained in Sec. 212.91 (under subpart (f)) refers to those performing middleman functions, e.g., jobbers, i.e., those who buy from refiners and resell to purchasers other than ultimate consumers. Sec. 212.91 allows the F.E.O. to treat certain subsidiaries performing as jobbers as part of the parent refiners. This has no application to the present case.

9. Section 212.91 states that subpart (f), which lays down pricing rules entirely separate from those applicable to refiners, applies to resellers, reseller-retailers, and retailers. Crystal Petroleum Company, Joe E. Hutchinson Distributing Company, Tulsa Oil Corporation, and Stone's Independent Oil Distributors, Incorporated, the non-refiner companies with which defendants attempt to consolidate all refining operations, are all retailers. (R. 549, and Crystal Oil Company Annual Report, 1973). The record fails to reveal any basis for treating them as "resellers", i.e., firms which purchase covered products and resell them without substantially changing their form, to purchasers other than ultimate customers. But the record, (e.g., Mr. Burns' reference to them as "retailers" and "reseller-retailers") and public disclosures, i.e., the annual reports, by Crystal Oil Company, show that the named subsidiaries are retailers. Accordingly, the portion of Sec. 212.91 further defining

"reseller" has no application. The retail distribution arms of Crystal Oil Company qualify as "retailers" and their pricing is governed by subpart (f). It matters not that the retail distribution subsidiaries might qualify as "resellers-retailers" for the special provisions contained in Sec. 212.91 apply only to "resellers".

10. Defendants are thus not entitled to calculate pricing under the formula on a consolidated basis.

11. Applying the formula properly, i.e., to the operations of Longview Refining Company, reveals a substantial overcharge. The amount of the overcharge is as is set forth in plaintiffs' Exhibit 6, through the month of February, 1974, i.e., the sum of $99,656.98.

12. Plaintiffs are entitled to recovery of penalties and attorney's fees by virtue of the overcharge as provided in the Economic Stabilization Act.

Conclusions of Law
Pertaining to Remedy

13. Section 210.83(b) provides that any person suffering legal wrong because of any act or practice arising out of the provisions of this chapter or any order issued pursuant thereto, shall be entitled to the relief provided in Section 210 of the Economic Stabilization Act of 1970. The Economic Stabilization Act, Public Law 91-379, as amended by Public Law 93-28, and Public Law 92-210, provides in Section 210(a) that any person suffering legal wrong because of any act or practice arising out of this title or any order or regulations issued

pursuant thereto, may bring an action in a District Court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for declaratory judgment, writ of injunction and/or damages. Section (b) provides that in any action brought under subsection (a) against any person selling goods who is found to have overcharged a plaintiff, the Court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) An amount not more than three times the amount of the overcharge upon which the action is based, or

(2) Not less than $100.00 nor more than $1,000.00; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error, the liability of the defendant shall be limited to the amount of the overcharge.

This section further provides that where the overcharge is not wilful within the meaning of Section 208(a), no action for the overcharge may be brought unless the plaintiff has first received payment for the overcharge within ninety days. Section 208(a) gives no definition of willful, but simply states that whoever wilfully violates any order or regulation shall be fined not more than $5,000.00 for each violation.

14. The precise meaning of "wilfulness"

may vary according to the legal context in which it appears. In criminal statutes "wilfulness" generally requires bad purpose or the absence of any justifiable excuse. In civil action however, these elements need not be present. Wilful conduct in this context denotes intentional, knowing and voluntary acts. It may also denote reckless disregard for the consequence of an action. Section 210 of the Economic Stabilization Act is essentially civil in nature, though it provides for what may be regarded as applicable to this case. Monday v. United States, 421 F.2d (7th Cir. 1970); Binkley Mining Co. of Missouri v. Wheeler, 133 F.2d 863 (8th Cir. 1943) cert. den. 319 U.S. 764; Stanton v. Machiz, 183 F.Supp. 719 (D.C. Md. 1960). Thus, in the framework of this case, an overcharge is wilfull where it is deliberate, or where it is the natural and probable consequence of actions of the defendants which are voluntary and intentional or which are in reckless disregard of the applicable regulations, as opposed to being the result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error.

15. Had this been a case of bona fide error which could have been corrected without the accrual of a substantial overcharge, the Court would be inclined to agree that the proper way to make refund is through application of the formula, for the formula is designed to allow the correction of innocent error and to make adjustments, on a month to month basis. However, this is a case of total failure to follow the formula over a protracted period of time, resulting in a substantial, and what must

be presumed to be a deliberate overcharge. The only remedy is that specified in Sec. 210 of the Economic Stabilization Act.

16. Based on the foregoing findings, plaintiffs are entitled to recover the overcharge during the "freeze" period, as shown by plaintiffs' Exhibit 2, and the overcharge resulting from pricing regulation violations, as shown by plaintiffs' Exhibit 6. The Court further finds that attorney's fees, costs, and penalty, as provided in the Economic Stabilization Act, should be awarded. With respect to penalty, the Court finds that the second alternative left to the Court's discretion, i.e., award of not less than $100.00 or more than $1,000.00 would be totally inadequate considering the number of plaintiffs, the magnitude of the violations and the facts surrounding such violations, and therefore, the Court directs that the amount of the recovery be trebled as provided in alternative No. 1 under Section 210. It is further provided that appropriate injunctive relief restraining future violations of the pricing regulations shall be granted, and that such judgment shall be without prejudice to any action seeking recovery of overcharges not covered by the present suit.

SIGNED and ENTERED this 22nd day of January, 1976.

/s/ Wm. Wayne Justice
UNITED STATES DISTRICT JUDGE

FILED
JUL 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1863

W. R. (BILL) SHORE, d/b/a
SHORE OIL PRODUCTS, et al., *Petitioners*
v.
LONGVIEW REFINING COMPANY, et al., *Respondents*

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A) is unreported. The judgment and findings of fact and conclusions of law of the United States District Court for the Eastern District of Texas (Pet. App. C and D, respectively) are also unreported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on February 15, 1977. On March 23, 1977, a petition for rehearing and a suggestion of rehearing *en banc* were denied (Pet. App. B and Resp. App. A, respectively). The petition for a writ of certiorari was initially filed on May 12, 1977. Petitioners were subsequently directed to file a corrected version of their petition and did so on June 27, 1977. The jurisdiction of the Court is invoked under 15 U.S.C. (Supp. V) §754(a)(1).

QUESTIONS PRESENTED

1. Whether the Temporary Emergency Court of Appeals was correct in holding that the Economic Stabilization Act of 1970 requires that a purchaser present a claim for refund to a seller and wait for a ninety-day period prior to instituting a civil action for recovery of an overcharge, unless the purchaser is able to demonstrate that the overcharge was "willful" in a criminal sense?

2. Whether the Temporary Emergency Court of Appeals was correct in holding that the trial court erred in failing to find the specific amount of overcharges in a sum certain as to each petitioner?

3. Whether the Temporary Emergency Court of Appeals was correct in holding that the trial court erred, with respect to alleged violations during the so-called formula period, in misapplying Agency regulations?

STATUTES AND REGULATIONS INVOLVED

The relevant statutes, §§208 and 210 of the Economic Stabilization Act of 1970, as amended (Stabilization Act), 12 U.S.C. (Supp. V) §1904 note, are set forth in their entirety in the opinion of the Temporary Emergency Court of Appeals (Pet. App. A at 13 n.19 and at 7-8 n.10, respectively). The regulations relevant to the Temporary Emergency Court of Appeals' reversal of the trial court's judgment are set forth in the appendices to the appellate court's opinion.

STATEMENT

Section 5(a) of the Emergency Petroleum Allocation Act of 1973, as amended (Allocation Act), 15 U.S.C. (Supp. V) §754(a), incorporates by reference §210 of the Stabilization Act. Section 210, entitled "Suits for Damages or Other Relief," creates a private right of action for violations of the Stabilization Act, the Allocation Act and regulations issued thereunder and provides for recovery of damages and in some circumstances treble damages where a purchaser has been overcharged. Section 210(b)(2), however, contains a jurisdictional prerequisite to an action for an overcharge, namely, unless it can be shown that an overcharge is

> willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller . . . a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

Section 208, entitled "Sanctions; criminal fine and civil penalty," provides:

(a) Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000 for each violation.

(b) Whoever violates any order or regulation under this title shall be subject to a civil penalty of not more than $2,500 for each violation.

Petitioners filed this action in the United States District Court for the Eastern District of Texas and sought declaratory and injunctive relief and monetary damages for certain actions allegedly committed by respondents, Longview Refining Company (Longview) and Crystal Oil Company (Crystal), in violation of the Stabilization Act and the Allocation Act.[1] The district court filed its findings of fact and conclusions of law and rendered judgment for petitioners against respondents in the amount of $518,053.71, plus interest and attorneys' fees. The district court found that during the two relevant time periods—the freeze period, June 13, 1973 through August 19, 1973, and the price formula period, November 1, 1973 through February 28, 1974[2]—one or both of the respondents overcharged

[1] Petitioners original complaint also asserted violations of the Sherman and Clayton Acts and of the parties' supply contract and the termination provisions of Article 2.309(e) of the Texas Business and Commerce Code. The district court, however, severed the claims arising under the Stabilization Act and the Allocation Act and advanced them on the trial docket. The decisions of the trial court and the Temporary Emergency Court of Appeals relevant to the instant petition for writ of certiorari relate solely to claims asserted under the Stabilization Act and the Allocation Act.

[2] The freeze period was implemented pursuant to Executive Order No. 11723, 38 F.R. 15763 (June 15, 1973). The price formula period began under the Phase IV program of economic controls. The relevant price formula regulations issued during Phase IV became effective August 19, 1973. 38 F.R. 22536 (August 22, 1973). Subsequently, the Federal Energy Office assumed responsibility over

petitioners in sales of motor gasoline and diesel fuel. The district court held that petitioners' failure to present claims for refund on respondents prior to instituting their civil action was of no consequence because respondents' overcharges were willful. (Pet. App. D.)

The Temporary Emergency Court of Appeals reversed. It held that the district court's finding of willfulness, as a basis for not requiring a pre-litigation presentment of claims to respondents, was based upon the erroneous conclusion of law that the civil meaning of willfulness was controlling for purposes of § 210 of the Stabilization Act. The court observed that § 210(b)(2) explicitly refers to a criminal standard of willfulness in § 208(a), that a number of courts have recognized the applicability of a criminal standard in this context,[3] and that the Stabilization Act's legislative history confirms this conclusion.[4] (Pet. App. A at 11-14). Further, the court held

> that to establish a willful overcharge there must be an intentional violation of a known legal duty, that is to say, to be willful an overcharge must have been made with the specific intention of charging a price which the defendant knew was in excess of the ceiling price allowable under the applicable pricing law and regulations. . . .
> (Pet. App. A at 16.)

petroleum-related controls and promulgated its own price formula regulations under the Stabilization Act and the newly-enacted Allocation Act. 39 F.R. 1924 (January 15, 1974).

[3] Manning v. University of Notre Dame du Lac, 484 F.2d 501, 503 (T.E.C.A. 1974); United States v. Gulf Oil Corp., 408 F. Supp. 450, 463 (W.D. Pa. 1975); United States v. Futura, 339 F. Supp. 162, 165 (N.D. Fla. 1972).

[4] Conf. Rep. No. 92-753, 2 U.S. Code Cong. & Admin. News, 92d Cong., 1st Sess. 2307, 2310 (1973).

The court also ruled that the district court failed to make any findings of the amount of overcharges in any sum certain and that with respect to the price formula period, the district court misapplied the relevant regulations.

The court remanded the case to the district court "for a determination of both the existence and the willfulness of any overcharge by defendants during the periods in controversy pursuant to the criminal standard of willfulness." (Pet. App. A at 16-17.) [5] The court subsequently denied a petition for rehearing and a suggestion of rehearing *en banc* (Pet. App. C; Resp. App. A).

ARGUMENT

The Temporary Emergency Court of Appeals correctly held that the word "willful" in §210(b)(2) of the Stabilization Act is used in the criminal sense and requires an intentional violation of known legal duty. This conclusion is fully supported by the language of the statute, its legislative history, and judicial construction of this and similar statutes. There is no conflict on this issue within the Temporary Emergency Court of Appeals, which denied petitioners' request for rehearing and suggestion of rehearing *en banc*. Indeed, the emergency appeals court followed its earlier decision in *Manning* v. *University of Notre Dame du Lac, supra*, 484 F.2d at 503-04, construing the "willful overcharge" requirement in §210(b)(2) "in the criminal sense." Further, the Temporary Emer-

[5] On remand, the district court was directed to order the Federal Energy Administration to be joined as a party to the litigation in view of its expertise in the interpretation, application, and enforcement of the statutes and pricing regulations in controversy.

gency Court of Appeals has exclusive jurisdiction over cases arising under the Stabilization Act and Allocation Act (Pet. App. A at 4 n.4). The court's opinion was based on its special familiarity with those Acts and their implementation. The court's treatment of the word "willful" is also consistent with prior decisions of this Court.

The issue of willfulness is threshold in nature. The district court's improper application of the civil standard of willfulness in and of itself requires reversal and remand. The presentation of claims for overcharges by petitioners to respondents prior to instituting the action below is a prerequisite to that court's jurisdiction, unless, of course, petitioners can demonstrate criminal willfulness on remand.

As to the ancillary issues addressed by the Temporary Emergency Court of Appeals, i.e., whether specific findings were required as to individual overcharges and whether the district court misapplied Agency regulations, they similarly do not present questions as to which a conflict exists within the Temporary Emergency Court of Appeals. Moreover, these issues are insubstantial in importance and merely relate to the inadequacy of findings of fact or the misapplication of Agency regulations.

1. Section 210(b)(2) of the Stabilization Act precludes the filing of a civil action to recover an overcharge prior to the time "a bona fide claim for refund of the overcharge" has been presented to the seller. This presentment of claims requirement is waived only where it can be demonstrated that the overcharge was "willful within the meaning of section 208(a)." It is

undisputed on the record that petitioners did not present respondents with claims for refunds of overcharges prior to instituting the action below. Thus, to satisfy the jurisdictional requirement, petitioners assert that the overcharges were "willful."

The terms of § 210 of the Stabilization Act could hardly be more clearly expressed. Section 210(b)(2) explicitly refers to § 208(a) for the meaning of the word "willful," and § 208(a) without question relates to the imposition of a criminal fine and is thus criminal in nature., Furthermore, the Temporary Emergency Court of Appeals has previously found that based on the language of § 210(b)(2) and its legislative history, the word "willful" is used "in the criminal sense." *Manning* v. *University of Notre Dame du Lac, supra,* 484 F.2d at 503-04.[6]

The standards to be applied in § 208(a) proceedings have also been previously considered by the courts. In *United States* v. *Futura, supra,* 339 F. Supp. at 165, the court held that § 208(a) was penal in nature and that Stabilization Act violations were "predicated upon a showing or finding of *scienter,* i.e. willful disobedience of the Act or regulations by the offender."[7] Simi-

[6] That case involved the question of whether the district court erred in dismissing an action on the grounds that appellants had failed to seek a refund from appellee prior to instituting an action for overcharges under the Stabilization Act. Absent an allegation that the overcharge was willful in a criminal sense, the appeals court affirmed the district court's dismissal, finding that the complaint failed to state a cause of action.

[7] Based on a review of the relevant legislative history, the court concluded "that Congress did in fact intend that a crime be created and did intend to provide for criminal punishment for violation thereof." Id. at 165-66.

larly, in *United States* v. *Gulf Oil Corp., supra,* 408 F. Supp. at 463, the court ruled that:

> The Congress in enacting § 208(a) of the Economic Stabilization Act, intended that those refiners who, with bad motive or criminal intent, refused to comply with the regulations passed pursuant to the Act, would thereby be subjected to criminal fines. . . .

2. Section 210(b)(2) reflects a well-conceived congressional judgment that non-judicial settlements of overcharge claims should be encouraged. It does not bar a civil action. Rather, if a seller refuses to refund an asserted overcharge within ninety days of the presentation of a claim, the purchaser may then bring suit for recovery of overcharges pursuant to § 210. The Congress recognized that the only circumstances in which the presentment of claims requirement would not be applicable is where the overcharge is willful in a criminal sense. In discussing § 210, the Conference Committee stated: "The House Bill also provided that the term 'willful' shall have the same meaning as in the case of criminal willfulness. . . . The Conference accepted the House provisions." Conf. Rep. No. 92-753, 2 U.S. Code Cong. & Admin. News, 92d Cong., 1st Sess. 2307, 2310 (1973).

3. In the context of the Federal tax laws, this Court has recognized that the concept of willfulness in criminal statutes invokes a criminal standard. In *United States* v. *Bishop,* 412 U.S. 346, 361 (1973), the Court acknowledged that the word "willfully" generally means "a voluntary, intentional violation of a known legal duty" and that:

> The Court's consistent interpretation of the word "willfully" to require an element of *mens rea* im-

> plements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.

A similar result obtained in the Court's recent decision in *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976). In connection with the standard applicable to the willful filing of false income tax returns, the Court held that willfulness means "a voluntary, intentional violation of a known legal duty."[8]

4. On the basis of the foregoing, it is apparent that the Temporary Emergency Court of Appeals was correct in rejecting the district court's less demanding, civil standard of willfulness for purposes of actions instituted under §210(b)(2) and holding

> that to establish a willful overcharge there must be an intentional violation of a known legal duty, that is to say, to be willful an overcharge must have been made with the specific intention of charging a price which the defendant knew was in excess of the ceiling price allowable under the applicable pricing law and regulations. . . .
> (Pet. App. A at 16.)

5. As to the remaining, ancillary issues raised by petitioners, none warrants review by this Court.

First, the court below correctly found that the district court simply failed to make findings of over-

[8] In so doing, the Court approved a number of cases recognizing the need for intentional conduct in violation of a known legal duty, not just negligent conduct, as constituting a prerequisite to a finding of willfulness. See, e.g., United States v. Pohlman, 522 F.2d 974, 976 (8th Cir. 1975) (en banc), cert. denied, 423 U.S. 1049 (1976); United States v. McCorkle, 511 F.2d 482, 484 (7th Cir.) (en banc), cert. denied, 423 U.S. 826 (1975).

charges as to any individual petitioner in any specific amount.[9] The district court's action ignores established precedent, e.g., *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. 415 (1943); *Evans* v. *Sun Tree Growers & Shippers, Inc.*, 531 F.2d 568 (T.E.C.A. 1976), and was appropriately held to be erroneous by the appellate court.

Second, for the violations allegedly arising under the price formula regulations, the Temporary Emergency Court of Appeals recognized that the district court ignored specific language in Agency regulations and administrative interpretations thereof. Without belaboring the errors committed by the district court, many of which are spelled out in the opinion of the court below (Pet. App. A at 22-38), it should be noted that specific language of key Agency regulations was disregarded,[10] and administrative interpretations thereof were not taken into account.[11] In hopes of avoiding similar errors and omissions on remand, the district court will have the benefit of the Federal Energy Administration's expertise, since the Temporary Emer-

[9] In this regard, the court below observed:

> [T]he district court's findings as to the facts relevant to the proof of any overcharges alleged in the plaintiffs' complaint are not sufficiently specific to substantiate concluding there was an overcharge by the defendants in any sum certain as to any individual plaintiff. (Pet. App. A at 11.)

[10] E.g., 6 C.F.R. § 150.355; 10 C.F.R. §§ 212.82(f), 212.83(e)(2), 212.83(e), and 212.91.

[11] E.g., Getty Oil Co. (Eastern Operations), Inc., Skelly Oil Co., 1975 CCH Energy Management Transfer Binder ¶ 83,041 (February 11, 1975); Esso Standard Oil S.A. Ltd., 1974 CCH Energy Management Transfer Binder ¶ 20,748 (December 20, 1974); Kerr-McGee Corp., 1974 CCH Energy Management Transfer Binder ¶ 20,658 (September 12, 1974).

gency Court of Appeals has directed the district court to order the Agency to be joined as a party to the litigation (Pet. App. A at 38-39).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 27, 1977

APPENDIX

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-17

LONGVIEW REFINING COMPANY AND CRYSTAL OIL COMPANY,
Appellants,

v.

W. R. (BILL) SHORE, et al., *Appellees.*

BEFORE HONORABLE JOE INGRAHAM, HONORABLE MARTIN D. VAN OOSTERHOUT, AND HONORABLE JOE EWING ESTES, JUDGES

Upon consideration of plaintiffs-appellees' Suggestion of Rehearing *En banc,*

IT IS ORDERED that said Suggestion is denied.

FOR THE COURT:

/s/ RUTH H. JACOBSON
Ruth H. Jacobson
Clerk

March 23, 1977